15-111
1 Abbott's Pr. 5 K. 351
Rowe's Ford's Int
Judge Davis

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~434~~ 279 38

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

JACOB SINGER, JOSEPH R. BICKERDIKE, ROBERT W. ROBINSON, C. PAESCH, JACOB CASPER SCHNEIDER, AND WILLIAM HOUSLEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED DECEMBER 20, 1870.

Dec. D. 1870

SUPREME COURT OF THE UNITED STATES.

No. 434.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

JACOB SINGER, JOSEPH R. BICKERDIKE, ROBERT W. ROBINSON, C. PAESCH, JACOB CASPER SCHNEIDER, AND WILLIAM HOUSLEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Præcipe for summons	2	1
Summons	3	2
Declaration	6	2
Leave to file amended declaration	14	5
Amended declaration	14	5
Pleas	16	6
Demurrer to declaration	19	7
Plea of non est factum withdrawn; demurrers heard	20	7
Demurrers further heard and taken under advisement	21	8
Leave to file additional pleas	22	8
Third amended plea	22	8
Plaintiffs' demurrer overruled; defendants' demurrer sustained	24	9
Motion to discharge defendant Paesch, overruled	24	9
Judgment	25	9
Clerk's certificate	27	10
Writ of error	28	10
Citation and service	31	11

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, in the absence pro tempore of the Hon. David Davis, one of the justices of the Supreme Court of United States, before the Hon. Thomas Drummond, circuit judge of the United States for the seventh circuit, and the Hon. Henry W. Blodgett, district judge of the United States for said northern district of Illinois, judges of said circuit court, on Wednesday, the twentieth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fifth year.

WILLIAM H. BRADLEY, *Clerk.*

THE UNITED STATES OF AMERICA
vs.
JACOB SINGER, JOSEPH R. BICKERDIKE, ROBERT W. ROBINSON, CHRISTIAN PAESCH, JACOB CASPER SCHNEIDER, & WILLIAM HOULSBY. } 8847.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

2 Be it remembered that, on the twenty-sixth day of May, in the year of our Lord one thousand eight hundred and sixty-nine, the United States of America, plaintiffs, by J. O. Glover, esq., their attorney, filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, their præcipe for a writ of summons against Jacob Singer, Joseph R. Bickerdike, Robert W. Robinson, Christian Paesch, Jacob Casper Schneider, and William Houlsby, defendants; which said præcipe is in the words and figures following, to wit:

Præcipe.

United States circuit court, northern district of Illinois, ss:

THE UNITED STATES OF AMERICA
vs.
JACOB SINGER, JOSEPH R. BICKERDIKE, ROBERT W. ROBINSON, CHRISTIAN PAESCH, JACOB CASPER SCHNEIDER, WILLIAM HOULSBY.

In a plea of debt. Debt, $92,000 00; dam'e, $92,000 00.

The clerk will please issue a summons in the above case returnable to the July term, 1869.

3 J. O. GLOVER, *U. S. Att'y.*

(Endorsed:) Filed May 26, 1869. W'm H. Bradley, cl'k.

On the same day, to wit, the 26th day of May, A. D. 1869, a writ of summons issued out of said clerk's office against said defendants as prayed in said præcipe; which said writ, together with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, northern district of Illinois, ss:

The United States of America, to the marshal of the northern district of Illinois, greeting:

We command you that you summon Jacob Singer, Joseph R. Bickerdicke, Robert W. Robinson, Christian Paesch, Jacob Casper Schneider, and William Houlsby, if they shall be found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, at the next term thereof, to be
4 holden at Chicago, in the district aforesaid, on the first Monday of July next, to answer unto the United States of America, in a plea of debt of ninety-two thousand dollars, and for the detention of said debt to their damage, as they allege, of ninety-two thousand dollars, and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 26th day of May, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the 93rd year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

I served the within summons upon Jacob Singer, therein named, on 3d day of June, A. D. 1869; upon Joseph R. Bickerdike, therein named, on the 2d day of June, A. D. 1869; upon Jacob Casper Schneider, therein named, on the 14th day of June, A. D. 1869, and upon William Houlsby, therein named, on the 16th day of June, A. D. 1869, by reading the same to and in the presence and hearing of each of them.

I did not serve Robert W. Robinson and Christian Paesch, not
5 being able to find them in my district.

B. H. CAMPBELL, *U. S. Marshal,*
By AUG. S. CAMPBELL, *Deputy.*

(Endorsed:) Filed July 6th, A. D. 1869. W'm H. Bradley, clerk.

6 On this day, to wit, the 3rd day of July, A. D. 1869, came said complainants, by their attorneys, and filed in said clerk's office their declaration in said entitled cause, which said declaration, together with the bond thereto attached, is in the words and figures following, to wit:

In the circuit court of the United States of America for the northern district of Illinois, of the May term of said court, in the year of our Lord one thousand eight hundred and sixty-9.

THE UNITED STATES OF AMERICA
vs.
JACOB SINGER, JOSEPH R. BICKERDIKE, Robert W. Robinson, Christian Peasch, Jacob Casper Schneider, William Houlsby.

The United States of America, plaintiffs in this suit, by J. O. Glover, their attorney, complain of Jacob Singer, Joseph R. Bickerdike, Robert W. Robinson, Christian Peasch, Jacob Casper Schneider, William
7 Houlsby, defendants therein, who were summoned, etc., of a plea

that they render unto the said plaintiffs the sum of ninety-two thousand dollars, which they owe and unjustly detain from them. For that whereas the said defendants heretofore, to wit, on the 18th day of January, in the year of our Lord one thousand eight hundred and sixty-9, at, to wit, Chicago, in the northern district of Illinois, and within the jurisdiction of this court, by their certain writing obligatory, sealed with their seals, and now to this court here shown, the date whereof is the same day and year aforesaid, acknowledged themselves to be held and firmly bound unto the said plaintiffs in the full and just sum of ninety-two thousand dollars above demanded, for the payment of which sum they, the said Jacob Singer and Joseph R. Bickerdike, together with the said Robert W. Robinson and Christain Peasch, Jacob Casper Schneider, & William Houlsby bound themselves, their heirs, executors, and administrators, firmly to the said plaintiffs
8 by the said writing obligatory. And the said plaintiffs say that the said writing obligatory, according to the statute in such case made and provided, was and is subject to a certain condition thereunder written, whereby, after reciting to the effect that the said Singer and Bickerdike intended, on and after the 18th day of January, A. D. 1869, to be engaged in the business of a distiller within the first collection district of the State of Illinois, to wit, at north branch Chicago River, near North avenue, situate in the city of Chicago, county of Cook, and State aforesaid, it was conditioned, among other things, to the effect following, that is to say, that if the said Singer and Bickerdike should, in all respects, faithfully comply with all the provisions of law in relation to the duties and business of distillers, then said writing obligatory should be void; otherwise it should remain in full force.

Nevertheless the said plaintiffs, in fact, say that the said Singer and Bickerdike have not, in all respects, complied with all the
9 provisions of law in relation to the duties and business of distillers, but have failed so to do in this, that the said Singer and Bickerdike, during the month of November, 1868, manufactured spirits at their distillery, and made return for that month to the assessor of the first collection district of the State of Illinois of spirits so manufactured, and the quantity of spirits so returned was less than 80 per cent. of the producing capacity of said distillery, as estimated under the provisions of the internal revenue law, and thereupon said assessor, to wit, on the 10th day of February, A. D. 1869, proceeded to make an assessment against the said Singer and Bickerdike for the deficiency in said return, which assessment amounted to a large sum, to wit, the sum of twenty-six thousand and eighty-nine dollars and sixty cents.

Yet the said Singer and Bickerdike, though often requested, have never paid said sum to the plaintiffs, nor any part thereof,
10 by reason of which breaches aforesaid of the condition of said writing obligatory the said writing obligatory hath become forfeited, and an action hath accrued to the said plaintiffs to demand and have of and from the said defendants the said sum of ninety-two thousand dollars above demanded, yet the said defendants, though often requested so to do, have not, as yet, paid the said sum of ninety-two thousand dollars, or any part thereof, but have hitherto wholly neglected and refused, and still neglect and refuse so to do, to the damage of said plaintiffs, of ninety-two thousand dollars; and therefor they bring suit.

J. O. GLOVER,

United States Attorney for the Northern District of Illinois.

Copy.] [Copy.

UNITED STATES INTERNAL REVENUE.

Distiller's bond.

[This bond must be executed by every distiller before commencing or continuing
11 business under this act, and on the first day of May in each succeeding year. (Act July 20, 1868, sec. 7.)]

Know all men by these presents that we, Jacob Singer, res. cor. Asylum place *said* Franklin, and Joseph R. Bickerdike, res. 85 Washington st., as principals; and Robert W. Robinson, res. 315 W. Lake st.; Christian Peasch, res. 526 N. La Salle st.; Jacob Casper Schneider, res. 207 Ind. st., and William Houlsby, res. 123 W. Randolph st., as sureties, are held and firmly bound unto the United States of America in the full and just sum of ninety-two thousand dollars money of the United States; to which payment well and truly to be made we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 18th day of January, A. D. 1869.

The condition of the foregoing obligation is such that whereas the said Jacob Singer and Joseph R. Bickerdike now, or intend, on and after the 18th day of January, 1869, to be engaged in the business
12 of a distiller within the first collection district of the State of Illinois, to wit, at North Branch Chicago River, near North avenue, situate in the city of Chicago, county of Cook, and State aforesaid:

Now, therefore, if the said Jacob Singer and Joseph R. Bickerdike, shall in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers, and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions, and shall not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distillery apparatus, to be encumbered by mortgage, judgment, or other liens during the time, in which he shall carry on said business, then this obligation shall be void; otherwise it shall remain in full force.

JACOB CARPENTER SCHNEIDER. [SEAL.]
WILLIAM HOULSBY. [SEAL.]
JACOB SINGER. [SEAL.]
JOSEPH R. BICKERDIKE. [SEAL.]
ROBERT W. ROBINSON. [SEAL.]
CHRISTIAN PEASCH. [SEAL.]

[25-c. internal revenue stamp cancelled.]

13 Signed, sealed, and delivered in presence of—
JOSEPH LISTER,
CHRISTIAN CASSLEMAN,
as to Jos. R. Bickerdike and Rob't W. Robinson.
A. ERSKINE, as to Singer and Peasch and Houlsby.
R. C. FELDKAMP,
R. W. PIKE, as to J. C. Schneider.

(Endorsed:) Filed July 3d, 1869. W'm H. Bradley, cl'k.

14 On this day, to wit, the 15th day of July, in the July term A. D.

1869, of said court in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

Leave to amend declaration.

THE UNITED STATES OF AMERICA
vs.
JACOB SINGER ET AL. } Debt.

On motion of the district attorney leave is given the plaintiffs to file an amended declaration herein.

On the same day, to wit, the 15th day of July, A. D. 1869, said plaintiffs, by their attorney, filed in said clerk's office their amended declaration in said entitled cause, which said amended declaration is in the words and figures following, to wit:

Amendment to declaration.

United States circuit court, northern district of Illinois. July term, 1869.

THE UNITED STATES OF AMERICA
vs.
JACOB SINGER, JOSEPH R. BICKERDIKE, & AL.

The pl'ffs move to amend their declaration by adding to the
15 statement of the breaches of the bond declared on the following:

And the said pl'ffs further say that the said Singer & Bickerdike have failed to comply with the provisions of law in relation to the duties & business of distillers, in this, that one C. W. Davis, an internal revenue storekeeper appointed by the Secretary of the Treasury of the United States, & assigned by the Commissioner of Internal Revenue to the distillery warehouse, of which said Singer & Bickerdike are proprietors, established by law, in connection with said distillery of said Singer & Bickerdike, at a salary of five dollars per day, had charge as such storekeeper of said warehouse from the fourth to the twenty-fifth days inclusive of March, A. D. 1869, & became thereby entitled to the sum of one hundred & ten dollars for said services, which said last-named sum has been paid by the pl'ffs to said Davis for said services, and it thereupon became the duty of said Singer & Bickerdike as such distillers & proprietors of said warehouse, to reimburse to the said pl'ffs said sum of one hundred & ten dollars. Yet the said Singer
16 & Bickerdike, though often requested, have never paid said sum or any part thereof to said plaintiffs.

By J. O. GLOVER, *U. S. Atty.*

(Endorsed:) Filed July 15th, '69. Wm. H. Bradley, cl'k.

On this day, to wit, the 19th day of July, A. D. 1869, came said defendants, by their attorneys, and filed in said clerk's office their pleas in said entitled cause is the following entry, to wit:

Pleas.

UNITED STATES OF AMERICA:

In the circuit court northern district of Illinois, of the July term, A. D. 1869.

THE UNITED STATES OF AMERICA
vs
JACOB SINGER, JOSEPH R. BICKERDIKE, Jacob Casper Schneider, William Houlsby, Robert W. Robinson and Christian Paesch. } Action of deb't.

(Withdrawn Nov. 12th, 1869, by agreement & with consent of the court.)

And the said defendants, Jacob Singer, Joseph R. Bickerdike, Jacob Casper Schneider, and William Housby come and defend the
17 wrong and injury when, &c., and say that the said supposed writing obligatory is not their deed; and of this they put themselves upon the country. Wherefore, &c.

BATES, TOWSLEY & OLNEY,
For Def'ts.

And the pl'ffs do the like.

By J. O. GLOVER,
U. S. Att'y.

2. And for further plea in this behalf the said defendants say that the *said defendants say that the* said Jacob Singer and Joseph R. Bickerdike did make return for the month of November, 1868, of all the spirits manufactured at their said distillery in said month of November, A. D. 1868, to the assessor of the first collection district of the State of Illinois, and that the quantity of spirits so returned was not less than eighty per cent. of the producing capacity of said distillery, as estimated under the provisions of the internal revenue law; and of this the said defendants put themselves upon the country.

BATES, TOWSLEY & OLNEY,
For Def'ts.

And the pl'ffs do the like.

By J. O. GLOVER,
U. S. Att'y.

18 (This 3 plea amended by leave of the court; third amended plea filed Jan'y 15, 1870.)

3. And for a third plea in this behalf the said defendants say that the said Jacob Singer and Joseph R. Bickerdike before the commencement of this suit fully paid and satisfied all assessments lawfully made against them for spirits produced at their said distillery since the date of the said supposed writing obligatory, to wit, since the 18th day of January, A. D. 1869; and this the said defendants are ready to verify. Wherefore, &c.

BATES, TOWSLEY & OLNEY,
For Def'ts.

And pl'ffs say said third plea is insufficient in law.

By J. O. GLOVER,
U. S. Att'y.

4. And for further plea in this behalf the said defendants say that there is no such assessment remaining in force as is set forth in plaintiffs' declaration in manner and form as therein stated; and of this said defendants put themselves upon the country.

BATES, TOWSLEE & OLNEY,
For Def'ts.

19 And the pl'ffs do the like.

By J. O. GLOVER,
U. S. Att'y.

(Endorsed:) Filed July 19th, 1869. W'm H. Bradley, clk.

On this day, to wit, the 27th day of October, A. D. 1869, came said defendants, by their attorneys, and filed in said clerk's office their demurrer in said entitled cause, which said demurrer is in the words and figures following to wit:

Defendant's demurrer.

UNITED STATES OF AMERICA:

In the circuit court of northern district of Illinois.

THE UNITED STATES
vs.
JACOB SINGER, JOSEPH R. BICKERDIKE, JACOB C. Schneider, William Houlsby, et al. } Debt on bond.

And the said defendants come and say that the said last count in plaintiffs' declaration and the matters and things therein stated in manner and form as therein set forth, are not sufficient in law; and this the said defendants are ready to verify. Wherefore, &c.

20 BATES & TOWSLEE & OLNEY,
For Def'ts.

(Endorsed:) Filed Oct. 27, 1869. W'm H. Bradley, clk.

On this day, to wit, the 11th day of November in the adjourned October term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause is the following entry to wit:

Plea withdrawn.—Demurrers heard.

THE UNITED STATES OF AMERICA
vs.
JACOB SINGER, JOSEPH R. BICKERDIKE, Robert W. Robinson, et al. } Debt.

Now come the parties, by their attorneys, and on motion of the defendants, by their attorney, leave is given them to withdraw their plea of non est factum filed herein, and thereupon comes on to be heard the demurrer of the defendants to the second count of the declaration and the demurrer of the plaintiffs to the third plea of *of* the defendants filed herein; and, after hearing the arguments of counsel until the hour of
21 adjournment, without concluding the same, the further hearing is postponed until to-morrow morning.

On the next day, to wit, the 12th day of November, A. D. 1869, in said October term of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

Demurrers heard & taken under advisement.

THE UNITED STATES OF AMERICA
vs.
JACOB SINGER, JOSEPH R. BICKERDIKE, Robert W. Robinson, et al. } Debt.

Now come again the parties, by their attorneys, and now comes on further to be heard the demurrer of the defendants to the second count of the declaration and the demurrer of the plaintiffs to the third plea of the defendants; and, after hearing the concluding arguments of counsel, the court, not being sufficiently advised in the premises, takes time to consider.

On this day, to wit, the 14th day of January, A. D. 1870, in the December term, A. D. 1869, of said court, in the record of the pro-
22 ceedings thereof in said entitled cause is the following entry, to wit:

Leave to file additional pleas.

THE UNITED STATES OF AMERICA
vs.
JACOB SINGER ET AL. } Debt.

On motion of the defendants, by their attorney, leave is given them to file additional pleas herein.

On this day, to wit, the 15th day of January, A. D. 1870, came said defendants, by their attorney, and filed in said clerk's office their third amended plea in said entitled cause; which said plea is in the words and figures following, to wit:

3d amended plea.

UNITED STATES OF AMERICA,
Northern District of Illinois:

December term A. D. 1870.

THE UNITED STATES
vs.
JACOB SINGER, JOSEPH R. BICKERDIKE, et al.

And the said defendants, for further plea in this behalf, say that the said Singer & Bickerdike made return to the assessor of the first collection district of the State of Illinois, of all highwines and
23 spirits produced at their said distillery during the month of November, A. D. 1868, as by law they were required to do; and that an assessment was made by the said assessor against the said Singer & Bickerdike for the full amount of the tax on the highwines and spirits so produced and returned, and that the amount so assessed has been fully paid. And the said defendants further aver that no other highwines or spirits were produced at said distillery during the

month of November, 1868, than what were returned as aforesaid; and this the defendant is ready to verify. Wherefore, &c.

OLNEY, *For Deft's.*

The pl'ffs say said plea is not sufficient in law.

L. H. BOUTELL,
Asst. U. S. Att'y.

(Endorsed Filed Jan'y 15, '70. W'm H. Bradley, cl'k.

24 On this day, to wit, the 31st day of January, A. D. 1870, in the December term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

Pl'ff's demurrer overruled.—Def'ts' demurrer sustained.

THE UNITED STATES OF AMERICA
vs.
JACOB SINGER ET AL. } Debt.

The court having considered, and being now fully advised upon the demurrer of the plaintiffs to the third amended plea of the defendants, and the demurrer of the defendants to the second count of the declaration herein, overrules said demurrer of the plaintiffs, and sustains said demurrer of the defendants.

On this day, to wit, the 27th day of June, in the adjourned May term, A. D. 1870, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

Motion to discharge def't Paesch overruled.

THE UNITED STATES OF AMERICA
vs.
JACOB SINGER ET AL. } Debt.

25 Now comes the district attorney, and comes also the defendant Christian Paesch, by Barnum & Nissen, his attorneys, for the purpose of this motion; and now comes on to be heard the motion of the said defendant, upon affidavit filed for his release and discharge herein from the jurisdiction of this court, and, after hearing the arguments of counsel, the court overrules said motion.

On this day, to wit, the 20th day of July, in the July term, A. D. 1870, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

Judgment.

THE UNITED STATES OF AMERICA
vs.
JACOB SINGER, JOSEPH R. BICKERDIKE, Robert W. Robinson, Christian Paesch, Jacob Casper Schneider, & William Houlsby. } Debt.

The plaintiffs and defendants, by their attorneys, electing to abide

by their several demurrers under the ruling of the court, entered herein, on the thirty-first day of January last. It is thereupon considered by the court that this cause be dismissed, and that the defendants be discharged, and that they go hence without day.

NORTHERN DISTRICT OF ILLINOIS, *ss*:

I, William H. Bradley, clerk of the circuit court of the United States for the district aforesaid, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in said entitled cause, wherein The United States of America are plaintiffs, and Jacob Singer, Joseph R. Bickerdike, Robert W. Robinson, Christian Paesch, Jacob Casper Schneider, and William Houlsby are defendants, as the same remains of record in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office in the said city of Chicago, this *this* first day of August, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fifth year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

[5-cent int. rev. stamp. affixed and canceled.]

Circuit court of the United States, northern district of Illinois

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between The United States of America, plaintiffs, and Jacob Singer, Joseph R. Bickerdike, Robert W. Robinson, Christian Paesch, Jacob Casper Schneider, and William Housley, defendants, a manifest error hath happened to the great damage of the said The United States of America, as by their complaint appears; and, it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twentieth day of July, in the year of our Lord, one thousand eight hundred and seventy, and of our independence the ninety-fifth year.

[SEAL.] W'M H. BRADLEY.

(Indorsed:) Circuit court U. S., nor. dist. Ill's. United States of America vs. Jacob Singer, Joseph R. Bickerdike, et al. Writ of error.

31 UNITED STATES OF AMERICA, *ss:*

To Jacob Singer, Joseph R. Bickerdike, Robert W. Robinson, Christian Paesch, Jacob Casper Schneider, William Howlsby, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein the United States is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this first day of October, in the year of our Lord 1870.

H. W. BLODGETT, *Judge.*

32 CHICAGO, *Oct.* 1, 1870.

I hereby accept service of the within citation.

H. S. MONROE,
Attorney for all of Defendants except Singer.
JOHN OLNEY,
Attorney for Jacob Singer.

33 (Indorsed:) Sup. Court, U. S., 1870, Dec. term. No. 434. The United States vs. Singer & al. Citation & service. Filed 3d January, 1870.

(Indorsement on cover:) No. 434. The United States, plaintiffs in error, vs. Jacob Singer, Joseph R. Bickerdike, Robert W. Robinson, Christian Paesch, Jacob Casper Schneider, and William Housley. N. Illinois C. C. U. S. Filed 20th December, 1870.

15-123

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~435.~~ 220 39

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

JOHN A. VAN BUSKIRK, SOLON CUMINS, AND PHILIP MEANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED DECEMBER 20, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 435.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

JOHN A. VAN BUSKIRK, SOLON CUMINS, AND PHILIP MEANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Præcipe	3	1
Summons	4	1
Declaration	5	2
Leave to file additional pleas	12	4
Plea	12	5
Demurrer attached to plea	14	5
Judgment	14	5
Clerk's certificate	16	5
Writ of error	17	6
Citation and service	20	6

2 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, in the absence pro tempore of the Hon. David Davis, one of the justices of the Supreme Court of the United States before the Hon. Thomas Drummond, circuit judge of the United States, for the seventh circuit, and the Hon. Henry W. Blodgett, district judge of the United States for the said northern district of Illinois, judges of said circuit court, on Wednesday, the twentieth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fifth year.

WILLIAM H. BRADLEY, *Clerk.*

THE UNITED STATES OF AMERICA
vs.
JOHN A. VAN BUSKIRK, SOLON CUMINS, PHILIP MEANY. } 8851.

3 NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty-sixth day of May, A. D. 1869, The United States of America, plaintiffs, by J. O. Glover, esq., their attorney, filed in the office of the clerk of the United States for the northern district of Illinois, at Chicago, in said district, their præcipe for a writ of summons against Jonn A. Van Buskirk, Solon Cumins, and Philip Meany, defendants, which said præcipe is in the words and figures following, to wit:

Præcipe.

United States circuit court, northern district of Illinois, ss:

THE UNITED STATES OF AMERICA
vs.
JOHN A. VAN BUSKIRK, SOLON CUMINS, PHILIP MEANY.

In a plea of debt. Debt, $20,000. Dam., $20,000.

The clerk will please issue summons in the above case, returnable to the July term, 1869.

J. O. GLOVER, *U. S. Att'y.*

4 (Endorsed:) Filed May 26, 1869. W'm H. Bradley, cl'k.

On the same day, to wit, the 26th day of May, A. D. 1869, a writ of summons issued out of said clerk's office against said defendants, as prayed in said præcipe, which said writ, together with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, northern district of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you that you summon John A. Van Buskirk, Solon

Cumins, and Philip Meany, if they shall be found in your district, to be and appear before our judges of our circuit court of the United States for the northern district aforesaid, on the first Monday of July next, to answer unto the United States of America in a plea of debt of twenty thousand dollars, and for the detention of said debt to their damage, as they allege, of twenty thousand dollars; and have you
5 then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago, aforesaid, this 26th day of May, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the 93rd year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

Served the within summons upon Solon Cumins, therein named, on the 2d day of June, A. D., 1869, and on Philip Meany, also therein named, on the 28th day of June, A. D. 1869, by reading the same to and in the presence and hearing of each of them. I did not serve John A. Van Buskirk, not being able to find him in my district.

B. H. CAMPBELL,
U. S. Marshal,
By AUG. S. CAMPBELL,
Deputy.

(Endorsed:) Filed July 6th, A. D. 1869. W'm H. Bradley, clerk.

On this day, to wit, the 3d day of July, A. D. 1860, said plaint-
6 iffs, by their attorney, filed in said clerk's office their declaration in said entitled cause, which said declaration, with the copy of bond attached, is in the words and figures following, to wit:

Declaration.

THE UNITED STATES OF AMERICA
vs.
JOHN A. VAN BUSKIRK, SOLON CUMINS, PHILIP MEANY.

In the circuit court of the United States of America for the northern district of Illinois, of the May term of said court, in the year of our Lord one thousand eight hundred and sixty-9.

The United States of America, plaintiffs in this suit, by J. O. Glover, their attorney, complain of John A. Van Buskirk, Solon Cumins, Philip Meany, defendants therein, who were summoned, etc., of a plea that they render unto the *the* said plaintiffs the sum of twenty thousand dollars, which they owe and unjustly detain from them.

For that, whereas, the said defendants heretofore, to wit, on
7 the 14th day of October, in the year of our Lord one thousand eight hundred and sixty-8, at, to wit, Chicago, in the northern district of Illinois, and within the jurisdiction of this court, by their certain writing obligatory, sealed with their seals, and now to this court here shown, the date whereof is the same day and year aforesaid, acknowledged themselves to be held and firmly bound unto the said plaintiffs in the full and just sum of twenty thousand dollars above demanded, for the payment of which sum they the said John A. Van Buskirk, together with the said Solon Cumins and Philip Meany bound

themselves, their heirs, executors, and administrators firmly to the said plaintiffs by the said writing obligatory. And the said plaintiffs say that the said writing obligatory, according to the statute in such case made and provided, was and is subject to a certain condition thereunder written, whereby, after reciting to the effect that the said Van Buskirk intended, on and after the 9th day of November, A. D. 1868, to be engaged in the business of a distiller within the first collection
8 district of the State of Illinois, to wit, at his distillery situate in in the city of Chicago, County of Cook, and State aforesaid, it was conditioned, among other things, to the effect following, that is to say, that if the said Von Buskirk should in all respects faithfully comply with the provisions of law in relation to the duties and business of distillers, then said writing obligatory should be void; otherwise it should remain in full force.

Nevertheless the said plaintiffs in fact say that the said Van Buskirk has not in all respects complied with all the provisions of law in relation to the duties and business of distillers, but has failed so to do, in this, that the said Van Buskirk, during the months of November and December, 1868, manufactured spirits at his said distillery and made return for those months to the assessor of the first collection district of the State of Illinois of spirits so manufactured, and the quantity of spirits so returned was less than 80 per cent of the producing capacity of said distillery as estimated under the provisions of the internal reve-
9 nue law, and thereupon said assessor, to wit, on the 10th day of February, A. D. 1869, proceeded to make an assessment against the said Van Buskirk for the deficiency in said return, which assessment amounted to a large sum, to wit, the sum of six thousand six hundred and ninety-eight dollars and sixty-seven cents. Yet the said Van Buskirk, though often requested, has never paid said sum to the plaintiffs nor any part thereof.

By reason of which breaches aforesaid of the condition of said writing obligatory the said writing obligatory hath become forfeited and an action hath accrued to the said plaintiffs to demand and have of and from the said defendants, the said sum of twenty thousand dollars above demanded: yet the said defendants, though often requested so to do, have not as yet paid the said sum of twenty thousand dollars or any part thereof, but have hitherto wholly neglected and refused, and still neglect and refuse, so to do, to the damage of said plaintiffs of twenty thousand dollars; and therefore they bring suit.

J. O. GLOVER,
United States Attorney for the Northern District of Illinois.

10 (Copy.)

UNITED STATES INTERNAL REVENUE.

Distiller's Bond.

[This bond must be executed by every distiller before commencing or continuing business under this act, and on the first day of May, in each succeeding year. Act July 20, 1868, sec. 7.]

Know all men by these presents that we, John A. Van Buskirk of Chicago, Cook County, Illinois, as principal, and Solon Cumins and Philip Meany both of the same place, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of

twenty thousand dollars, money of the United States, to which payment well and truly to be made we jointly and severally bind ourselves, our heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated this 14th day of October, A. D. 1868.

The condition of the foregoing obligation is such, that whereas the said John A. Van Buskirk intend, on or after the 9th day of November,
11 1868, to be engaged in the business of a distiller within the first collection district of the State of Illinois, to wit, at his distillery situate in the city of Chicago, county of Cook, and State aforesaid:

Now, therefore, if the said John A. Van Buskirk shall in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions, and shall not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distillery apparatus to be encumbered by mortgage, judgment, or other lien during the time in which he shall carry on said business, then this obligation shall be void; otherwise it shall remain in full force.

JOHN A. VAN BUSKIRK. [SEAL.]
SOLON CUMINS. [SEAL.]
PHILIP MEANY. [SEAL.]

[25c. internal revenue stamp, cancelled.]

Signed, sealed, and delivered in presence of
W'M D. KERFOOT,
HARRY VAN BUSKIRK.

12 Filed July 3d, 1869. W'm H. Bradley, cl'k.

On this day, to wit, the 14th day of January, A. D. 1870, in the December term, A. D. 1869, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

Leave to file additional pleas.

THE UNITED STATES OF AMERICA
vs.
JOHN A. VAN BUSKIRK ET AL. } Debt.

On motion of the defendants, by their attorney, leave is given them to file additional pleas herein.

On this day, to wit, the 2d day of February, A. D. 1870, came said defendants, by their attorneys, and filed in said clerk's office their plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:
In the circuit court of the United States for the northern district of Illinois.

JOHN A. VAN BUSKIRK, SOLON CUMINS, and Philip Meany,
ats.
UNITED STATES OF AMERICA.

And the said defendants, by Monroe and McKinnon, their attorneys, come and defend the wrong and injury, when, &c., and say that the said John A. Van Buskirk made return to the collector of the first collection district of the State of Illinois, of all the highwines and spirits produced by him at his said distillery during the months of November and December, 1868, as by law he was required to do, and that assessments were made by the said assessor against the said John A. Van Buskirk, for the full amount of the tax on the highwines and spirits so produced and returned, and that the amount so assessed has been fully paid, and said defendants further aver that no other highwines or spirits were made or produced at said distillery during the said months of November and December, 1868, than what were re-
14 turned as aforesaid, and this said defendants are ready to verify; wherefore, &c.

By MONROE AND McKINNON,
Their Attorneys.

The pl'ffs say said plea is not sufficient in law.
By J. O. GLOVER, *U. S. Att'y.*

(Endorsed:) Filed Feb'y 2d, 1870. W'm H. Bradley, cl'k.

On this day, to wit, the 20th day of July, in the July term, A. D. 1870, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

Judgment.

THE UNITED STATES OF AMERICA
vs.
JOHN A. VAN BUSKIRK, SOLON CUMINS, AND Philip Meany. } Debt.

The court having considered and being now fully advised upon the demurrer of the plaintiffs to the plea of the defendants, filed herein on the second day of February last, overruled said demurrer, to which ruling of the court the plaintiffs, by their attorney, except, and
15 the plaintiffs electing to abide by their demurrer, it is thereupon considered by the court that this cause be dismissed, and that the defendants be discharged, and that they go hence without day.

16 NORTHERN DISTRICT OF ILLINOIS, *ss:*
I, William H. Bradley, clerk of the circuit court of the United

States for said district, do hereby certify the above and foregoing to be a true, correct and complete transcript of the record of all the proceedings had in said court, in said entitled cause wherein the United States of America are plaintiffs, and John A. Van Buskirk, Solon Cumins, and Philip Meany are defendants, as the same remains of record in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in the city of Chicago, in said district, this first day of August, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fifth year.

[SEAL.] WILLIAM H. BRADLEY, *Clerk.*

[5-ct. int. rev. stamp affixed and canceled.]

17 CIRCUIT COURT OF THE UNITED STATES,
Northern District of Illinois:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you between the United States of America, plaintiffs, and John A. Van Buskirk, Solon Cumins, and Philip Meany, defendants, a manifest error hath happened to the great damage of the said the United States of America, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States,
18 together with this writ, so that you have the same at Washington on the first Monday of December next in the said Supreme Court, to be then and there held, that the record and proceedings, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twentieth day of July, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fifth year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

19 (Indorsed:) U. S. circuit court, nor. dist, Ill's. United States of America vs. John A. Van Buskirk, Solon Cumins, & Philip Meany. Writ of error.

20 UNITED STATES OF AMERICA, *ss:*

To John A. Van Buskirk, Solon Cumins, & Philip Meany, greeting:

You are hereby cited and admonished to be & appear at a Supreme Court of the United States to be holden at Washington on the first Monday in December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein The United States is plaintiff & you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected & speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this first day of October, in the year of our Lord 1870.

H. W. BLODGETT, *Judge.*

21 CHICAGO, *Oct.* 1, 1870.

I hereby accept service of the within citation.

(Erased) JOHN A. VAN BUSKIRK,
By H. S. MONROE,
Attorney for Def'ts in Error.

22 (Indorsed:) Supreme Court, U. S. 1870, Dec. term, No. 435. The United States, pl'ff in error, vs. Van Buskirk. Citation & service. Filed 3d January, 1870.

(Indorsement on cover:) No. 435. The United States, plaintiffs in error, vs. John A. Van Buskirk, Solon Cumins, and Philip Meany. N. Illinois, C. C. U. S. Filed 20th December, 1870.

11 = 111 ∝ 123

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

THE UNITED STATES, *Plaintiffs in Error*,
vs.
JACOB SINGER AND OTHERS. } No. 219.

UNITED STATES
vs.
JOHN A. VAN BUSKIRK AND OTHERS. } No. 220.

In error to the Circuit Court of the United States for the northern district of Illinois.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

THE UNITED STATES, *Plaintiffs in Error*,
vs.
JACOB SINGER AND OTHERS. } No. 219.

In error to the Circuit Court of the United States for the northern district of Illinois.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an action of debt upon a distiller's bond, dated the 18th of January, 1869, and executed by Singer and Bickerdike, as principals, and the other defendants as sureties, whereby the parties covenanted that the principals "shall, in all respects, faithfully comply with the provisions of the law in relation to the duties and business of distillers, and shall pay all penalties incurred or fines imposed upon them for violation of any of the said provisions."

The Government assigned as a breach of said bond that "the said Singer and Bickerdike, during the month of November, 1868, manufactured spirits at their distillery, and made return for that month to the assessor of the first collection district of the State of Illinois, of spirits so manufactured, and the quantity of spirits so returned was less than eighty per cent.

of the producing capacity of said distillery, as estimated under the provisions of the internal revenue law, and, thereupon, said assessor, to wit, on the 10th day of February, A. D. 1869, proceeded to make an assessment against the said Singer and Bickerdike, for the deficiency in said return, which assessment, amounting to $2,689 60, the said Singer and Bickerdike have refused to pay.

To this the defendants pleaded that the said Singer and Bickerdike, "before the commencement of this suit, fully paid and satisfied all assessments lawfully made against them for spirits produced at their said distillery since the date of said" bond.

To this plea the plaintiffs demurred.

By an amended declaration, the plaintiffs assign as another breach of said bond that "one C. W. Davis, an internal revenue storekeeper, appointed by the Secretary of the Treasury of the United States, and assigned by the Commissioner of Internal Revenue to the distillery warehouse, of which said Singer and Bickerdike are proprietors, established by law, in connection with said distillery of said Singer and Beckerdike, at a salary of five dollars per day, had charge, as such storekeeper, of said warehouse from the fourth to the twenty-fifth days, inclusive, of March, A. D. 1869, and became thereby entitled to the sum of one hundred and ten dollars for said services; which said last-named sum has been paid by the plaintiffs to said Davis for said services, and it thereupon became the duty of said Singer and Bickerdike, as such distillers and proprietors of said warehouse, to reimburse to the said plaintiffs

said sum of one hundred and ten dollars; yet the said Singer and Bickerdike, though often requested, have never paid said sum or any part thereof to said plaintiffs."

To this amended declaration the defendants demurred.

Judgment was given by the circuit court of the United States for the defendants, (see 13 Int. Rev. Rec., 209,) and this writ of error was brought.

The United States assign as error:

First. That by section 20 of the act of July 20, 1868, (15 Stats. at Large, 133–4,) the defendants, Singer and Bickerdike, were liable to be taxed for a quantity of spirits equal to eighty per cent. of the producing capacity of their distillery, whether the amount actually manufactured equalled that quantity or not.

Second. That by the resolution of March 29, 1869, (16 Stats. at Large, 52,) the defendants were bound to repay to the United States what the latter had paid to Davis as storekeeper.

I.

(1.) The first question turns upon the construction to be put upon section 20 of the act of July 20, 1868, which is as follows:

"That on the receipt of the distiller's first return in each month, the assessor shall inquire and determine whether said distiller has accounted in his returns for the preceding month for all the spirits produced by him; and to determine the quantity of spirits thus to be accounted for, the whole quantity of materials used for the production of spirits shall be ascertained; and forty-five gallons of mash or beer brewed or fermented from grain shall represent not less than one bushel of grain, and seven gallons of mash or beer

brewed or fermented from molasses shall represent not less than one gallon of molasses. In case the return of the distiller shall have been less than the quantity thus ascertained, the distiller or other person liable shall be assessed for such deficiency at the rate of fifty cents for every proof gallon, together with the special tax of four dollars for every cask of forty proof gallons, and the collector shall proceed to collect the same as in cases of other assessments for deficiencies; but in no case shall the quantity of spirits returned by the distiller, together with the quantity so assessed, be for a less quantity of spirits than eighty per centum of the producing capacity of the distillery, as estimated under the provisions of this act."

What is the proper construction to be put upon the last sentence of this section? The language in this section would seem too plain to admit of doubt. Standing alone, and interpreted according to the natural meaning of the words, its meaning is, that the minimum amount of the tax which a distiller is required to pay is never to be less than eighty per cent. of the producing capacity of his distillery. The language is peremptory, and the only arguments against this construction are founded upon the language of the provisions of other sections of the act, which it is contended control the meaning of this, and upon the supposed injustice of the section if thus interpreted.

In answer to the first objection, it may be said that it is a very common case to tax the occupation of people in proportion to their capacity to do business. Thus, keepers of billiard tables are taxed according to the number of their tables, and hotel keepers, according to the rent they pay; and by section 13 of this act, (15 Stats. at Large, 130,) a daily tax is assessed upon dis-

tillers based upon the capacity of their distilleries. Nor does section 19 conflict with section 25, as thus construed. That enacts, that distiilers shall, from day to day, make certain entries in books, and shall likewise make and subscribe an oath stating the amount of spirits manufactured by them. Construing sections 19 and 20 together, our construction does not, as the learned circuit judge thought, compel the distiller to make an oath that he had actually manufactured a quantity of spirits equal to eighty per cent. of the capacity of his distillery, but requires him to make an oath of the amount he has actually manufactured, and then assesses the tax upon him, so that in any case it shall equal at least eighty per cent. of the capacity of his distillery, and if he has manufactured more than that, then upon the amount actually manufactured.

In this respect, the statute bears a strong resemblance to the provision of the act of March 3, 1857, which was before the court in the case of Kimball *vs.* The Collector, (10 Wallace, 436.) There it was enacted that "sheep's wool of the value of 20 cents per pound or less, at the place of exportation, shall be exempt from taxation." But another provision of the law enacted that "under no circumstances shall the duty be assessed upon an amount less than the invoice or entered value, any law of Congress to the contrary notwithstanding;" and the court held that, if the invoice value of sheep's wool was more than 20 cents a pound, it was liable to pay duty, although the actual value thereof at the time and place of exportation was less than 20 cents; that is to say, by the laws impos-

ing customs duties, while the invoice or entered value does not bind the Government, which may impose a duty on goods as for a greater value, if upon an appraisement the invoice or entered value is shown not to be correct, yet the importer must pay duties upon the invoice or entered value, although the actual value might be less.

This construction is the one given to this section by Judges Miller, Dillon, and Love, in the circuit court for the district of Iowa; and by Judge Withey, in the circuit court for the western district of Michigan.

United States *vs.* Nissley, 1 Dillon C. C., 586.
United States *vs.* Reed, 13 Int. Rev. Rec., 148.

The second objection to this construction is the presumed hardship to the distiller; but if this is the right construction of the statute, whether the act is an equitable one or not is a question with which the court has nothing to do. All systems of taxation are artificial, and must work hardship in certain cases.

II.

There can be no doubt of the constitutionality of this section as thus interpreted. The tax imposed upon the manufacturer of spirits is an excise; and the only limitation upon the power of Congress to impose excises is, that they must be "uniform throughout the United States."

"Nothing," says the Chief Justice, "is clearer from the discussions in the Convention, and the discussions which preceded final ratification by the necessary num-

ber of States, than the purpose to give this power [of taxation] to Congress, as to the taxation of everything except exports in its fullest extent. This purpose is apparent, also, from the terms in which the taxing power is granted. The power is 'to lay and collect taxes, duties, imposts, and excises, to pay the debt and provide for the common defence and general welfare of the United States.' More comprehensive words could not have been used. Exports only are by another provision excluded from its application. * * * If Congress sees fit to impose a capitation or other direct tax, it must be laid in proportion to the census; if Congress determines to impose duties, imposts, and excises, they must be uniform throughout the United States. These are not strictly limitations of power. They are rules prescribing the mode in which it shall be exercised. It still extends to every object of taxation, except exports, and may be applied to every object of taxation to which it extends, in such measure as Congress may determine. * * * The words used certainly describe the whole power, and it was the intention of the Convention that the whole power should be conferred."

Veazie Bank *vs.* Fenno, 8 Wallace, 540–1.

See, also, Pacific Insurance Company *vs.* Soule, 7 Wallace, 433.

As every distiller in the United States has to pay a tax like this for the privilege of manufacturing spirits, the tax is "uniform throughout the United States," and that is all the Constitution requires.

III.

Upon the second error assigned, counsel desire to say nothing in addition to what is said in their brief in United States *vs.* Powell, No. 188, on the present docket.

UNITED STATES
vs.
JOHN A. VAN BUSKIRK AND OTHERS. } No. 220.

This case is precisely similar to the above case of the United States against Singer and others.

C. H. HILL,
Assistant Attorney General.

15-111 & 123

UNITED STATES SUPREME COURT

December Term, A. D. 1870

UNITED STATES, *v.* JOHN A. VAN BUSKIRK, *et al.*

UNITED STATES, *v.* SINGER & BICKERDIKE, *et al.*

BRIEF OF EDWARD ROBY, FOR DEFENDANTS IN ERROR.

UNITED STATES
SUPREME COURT. DECEMBER TERM, A. D. 1870.

United States
v.
John A. Van Buskirk et al.,

Same
v.
Singer et al.

Error to Seventh Circuit.

Brief of Edward Roby of Counsel for Defendant in Error.

This was an Action of Debt on a distiller's bond, conditioned for the payment of taxes.

The breach laid in the declaration, was that the law required the distiller to produce and pay taxes upon eighty per cent. of the "producing capacity" of his distillery, and upon 14 quarts of proof spirits for every bushel of grain used therein, and that he had not.

To this declaration defendants demurred, saying that it was not sufficient in law. The facts, however, being agreed, at the request of the District Judge who held the Circuit, after the argument, a special plea was substituted, i. e., that defendant had reported to the government and paid the tax on all the spirits that he had produced. And to this the plaintiff demurred; and this demurrer being overruled, judgment was rendered for the defendants.

Upon both demurrers the questions were the same. On the part of the plaintiff it was claimed that the Government had laid a tax of fifty cents per gallon, and four dollars additional per barrel, on the deficiency wherever a distiller had failed to produce 14 quarts of proof spirits from every bushel of grain, used by him, and eighty per cent. of the "producing capacity" of his distillery in any event, without reference to the amount of grain used or even without reference to whether the distillery was run or not, and that the Government had laid this burden *upon the distiller*, and required him to pay it as a tax upon him.

A failure so to pay was the breach alleged and these claims are now urged as the sole ground for reversal of the judgment of the Circuit Court.

It would seem that this case had already been decided in the License Tax Cases(*a*) which are based upon a series of propositions and distinctions (*b*). *First.* Where Congress possesses constitutional power to regulate trade, it may regulate it by means of licenses. *Second.* Over the commerce and domestic trade of the States, Congress has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature.

Third. The power to tax is given to Congress with but one exception and two qualifications, i. e., Congress can not tax exports, and *must* impose direct taxes in proportion to the census, and indirect taxes by the rule of uniformity.

Fourth. This power thus, and only thus limited, reaches every subject; but—

Fifth. It reaches only existing subjects(*c*).

If these are principles, this action fails, because by the pleadings it is admitted that the spirits on which the tax was laid were never in existence, were not existing subjects; and, therefore, it can not be laid as a tax thereon: and if it is a penalty for not producing, as the bond was conditioned for the payment of all fines laid, as well as all taxes imposed, on defendant as a distiller, if we admit that a party can be convicted for violation of law and his fine assessed against him without judge or jury; still the action fails because Congress had no power to impose the regulation on the domestic trade of a State, for the violation of which the penalty was imposed, and being no law, there can be no crime, and no penalty therefor.

"Congress can not authorize a trade or business within a State in order to tax it"(*d*).

Congress could not authorize the production of 14 quarts of spirits from a bushel of grain, if the State law had prohibited the production of more than 12. Nor could it authorize the mashing of a bushel of grain with only 35 gallons of water if the State law had commanded the use of 80 gallons; nor the production of 1000 gallons per day by a distilllery of a given size if the State had forbidden the production of

(*a*) 5 Wallace, 462.
(*b*) Page 470.
(*c*) Page 471.
(*d*) Ibid, 471.

more than half that amount; because over this domestic trade Congress has no power of regulation nor any direct control; this power belongs exclusively to the States.

If Congress can not, in order to tax it, authorize the production of 2 quarts or 500 gallons, because it has no power whatever over the subject, it can not compel such production.

For the purpose of reviewing that which in the declarations filed in these cases is called the law, I will here repeat substantially that which I have already said in briefs touching the same matter filed in this Court at this term (*a*).

(Those cases were in chancery, and the arguments in those pages which relate to the jurisdiction of the Court to hear and administer relief are of course omitted).

1st. Section 1, of the Act of July 20, 1868, provides that there shall be levied and collected on all distilled spirits, etc, a tax of 50 cents per gallon, to be paid by the distiller before the spirits are removed from the distillery; and the tax shall be a lien, etc., *from the time said spirits are distilled* until said tax be paid.

Sec. 4, defines distilled spirits, and provides that "the tax "shall attach to this substance *as soon as it is in existence.*"

These are the only provisions of the statute which lay the tax of 50 cents per gallon.

Sec. 59, requires distillers to pay $4.00 per barrel, on each barrel produced * * *.

They do not lay a tax of any sort upon spirits, before their existence; nor is there any provision in them that makes any man liable for a tax on anything but proof spirits, or alcohol in some form of existence;—and that, which never existed, is not alcohol—is nothing—; these provisions do not tax that.

2d. Statutes, contrary to the law of nature and right reason, are void (*b*).

It is unreasonable to fine a man for not producing or having skill, or to tax him on nothing, or for nothing.

Statutes should be construed in harmony with justice, reason and the Constitution; and, in order to support them, *must*

(*a*). Mason v. Hart et al., pp. 187 to 221; Mason v. Mann, pp. 187 to 221 Mason v. Rollins, pp. 187 to 221.

(*b*) Dr. Bonham's case, 8 Co. Rep., 118. Stockdale v. Hansard, 9, A. & E. 93. Ham v. McClews, 1 Bay 93, South Carolina, 1793. License Tax cases. 5 Wallace, 469.

and *shall* can be construed to mean *may*, and the whole section 20, may be considered as merely directory(*a*).

3d. Statutes, which abridge the liberty of the subject, ought to receive the strictest construction (*b*).

It is a well settled rule of law that every charge upon the subject, must be imposed by clear and unambiguous language. * * * Statutes, which impose a duty upon the public will be critically construed with reference to the particular language in which they are expressed(*c*).

Where there is any ambiguity found, the construction must be in favor of the public.

A tax shall not be considered to be imposed, without a plain declaration of the intention of the legislature to impose it(*d*).

In this case a canal Act directed that no boat navigating thereon, of less burthen than 20 tons, or which should not have a loading of 20 tons on board, should be allowed to pass through any of the locks, unless on payment of tonnage equal to a boat of 20 tons. Held that the clause did not impose a toll upon empty boats,—that the burthen must rest upon plain, unambiguous language.

The whole statute abridges the citizen's liberty, and, in terms, lays a tax on existing things, as above set forth; it could only be said to lay a tax on these deficiencies, these non-existing articles, by a most liberal construction of Section 20; and a liberal construction against the citizen, is not permitted. It is unjust to require a man to pay a tax on nothing, and unreasonable to charge such an one with heavy burdens; for, if he makes nothing, he has nothing to protect, and should pay nothing but the poll tax, by the law of nature.

This assessment is void on its face.

The tax is laid on nothing.

Section 20, is directory, only: not mandatory; and the assessor cannot follow the rule, unless he believes it will enable him, correctly, to ascertain the amount produced(*e*).

(*a*) I use this distinction because it is frequently used in the books, but can not concede to it the assent of my reason. Law is a rule of action. (1 Bl. Com. 38). Municipal Law is a rule of civil conduct prescribed by the supreme power of the State, commanding or forbidding. (Ibid. 44). Law is a command. (Ibid. 45). Therefore, if it is not a command, (not mandatory), it is not law, and a statute which is not law is void. In England it is necessary to provide mean to evade bad laws. In America, the constitutions provide the rules, and delegate the authority; if the statute is within the authority delegated, it is law, if not, it is void.

(*b*) Dwarris, 646.

(*c*) Dwarris, p, 646. 8 East., p. 245.

(*d*) Dwarris, 646. Dock Co. v. Brown, 2 B. & Al., 58. Company &c. v. Hustler, 1 B. & C., 425.

(*e*) See note ante.

The tax, based on the void assessment, laid on nothing, and without express words, equivocally, and charged by an arbitrary and false rule, has nothing to rest upon, and is void.

~~Ergo:~~

~~This injunction will not prevent the collection of a tax, but merely the exercise of arbitrary power under a false name.~~

English lawyers do not inculcate implicit obedience to statutes which lead to absurd consequences or an infraction of natural law; they hold it inapplicable, and declare the particular case excepted out of the statute, even though the letter of the law be against them(*a*).

Section 13, lays a tax on the fermenting capacity, by bushels; Section 20 provides that 45 gallons of mash shall represent not less than a bushel of grain. By an almost extravagant liberality of construction, Section 13 may be construed by Section 20; but there is no provision of the statute, that a bushel of grain shall represent 14 quarts of proof spirits, or any other amount.

Yet, the legislature, by Section 20, declare the relation and proportion of these products to be within the scope of legislation; and, as Congress can not delegate, to any man, its legislative power, and as it has provided no rule (even though it intended that 14 quarts should represent a bushel), but omitted this essential part from the solemnities of its enactment,—no such rule exists, and no levy, based thereon, is a tax(*b*).

Even if this was a tax,—as the statute does not, in terms, require any person to pay it, but only requires the collector to collect, as in other cases of deficiencies,—it can only be charged on the plaintiff or his property, by an equitable construction, which is contrary to the well established rule of law, that "every statute, derogatory to the rights of property, "or, that takes away the estate of the citizen, ought to be "construed strictly; it should never have an equitable con- "struction(*c*):"—a rule, which has been reiterated in every State in the Union, in tax cases; and, in the 2,400 tax cases, reported, has never been questioned in its application to them.

Sedgwick, in his treatise on Statute and Constitutional Law,

(*a*) (Plowden) Dwarris, 484 and 623.
(*b*) Van Horne's Lessees v. Dorrance, 2 Dallas, 316.
(*c*) Sharp v. Spear, 4 Hill, 84; Van Horne's Lessees v. Dorrance, 2 Dallas, 316; Dwarris, 646.

speaks of the power of taxation as, this *tremendous power of eminent domain*, before which every citizen lies prostrate.

And others, with what seems to me equally superficial examination, have spoken of it as a power, against which the only security is, that it is exercised by the people's representatives.

It is true that the cases in the United States Courts, upon taxation by the United States, are few and far between. The first is Hylton v. The United States(*a*) which decides that, a tax on carriages is not a direct tax but a duty or impost, and, being uniform, is a valid tax. And, as if to assert the right of the Courts to examine the whole subject, without reference to the fact that these taxes are laid by the representatives of the people,—the Court ignores the matter altogether, examines elaborately the general subject, and supports the tax in question, on its general equity and uniformity.

The next is that of Loughborough v. United States(*b*), which decides that the power of taxation by the Government, extends to all places within its dominions, as well to the District of Columbia and the Territories, which are *not represented*, as to the States which are; that *there may be taxation without representation*, but that, if the power is exercised, it must be in accordance with the rules of the Constitution, viz: if direct, in proportion to the census, and if a duty, impost or excise, it must be uniform.

And Chancellor Kent speaks of this paradox that, in the United States, taxation has no connection with representation.

Further, if this could be a tax, it is invalid, for want of uniformity.

The excise on spirits manufactured, is 50 cents per gallon, and four dollars per barrel; and, to be uniform throughout the United States, it must be 50 cents on every gallon and $4.00 on every barrel produced.

Had the defendant produced 20 per cent. more than the producing capacity of his distillery, or, had he produced 16 quarts to every bushel of grain, the excision would have been 50 cents and $4.00. He produced about half that amount, and with this deficiency assessed, it makes the tax about 90 cents a gallon and $7.00 per barrel.

It will not do to attempt to evade this inequality, by saying, the State, or the collector, did not know that the amount was not all produced; that the statute fixed the amount on which the

(*a*) 3 Dallas, 171.
(*b*) 5 Wheaton, 317.

tax shall be paid, and the assessment is based on the statute.

The United States cannot violate the spirit of the Constitution with impunity, any more than the State of New York; and cannot, by fixing arbitrary valuations, nullify the provision of uniformity.

In the "Bank tax case,"(*a*) New York had fixed an arbitrary value on the property of the Banks, incorporated under State charters, and made them "liable to taxation, equal "to the amount of the capital stock, paid in, or secured to be "paid in, and their surplus earnings;" and this was held to be a tax on the property of the Bank; and that, when that property consists of United States Bonds, the law laying the tax is void.

Now, this Section requires the assessor to ascertain whether the distiller has accounted for all the spirits produced by him, and provides an arbitrary rule therefor; and if the returns shall be for less than the amount thus ascertained, the distiller shall be assessed 50 cents per gallon and $4.00 per barrel, on such deficiency; but in no case shall the aggregate quantity assessed be less than 80 per cent. of the producing capacity.

New York said, we will lay a tax on the valuation, and ignore the property.

This Statute says, we will lay the tax on 80 per cent., and ignore the actual production, if less.

New York's tax was held void, because she could not, by any subterfuge, evade the fact that the property, and not the valuation, was the thing taxed.

And this must, likewise, be overthrown; because no subterfuge can evade the fact, that the whole tax is laid on the spirits produced, and not on arbitrary representation of them.

In the opinion of the Court below in the case of the United States v. Singer et Bickerdike, it is well laid down, that "it "is not possible, even for an act of Congress, to make a "bushel of grain produce more spirits than nature has sup-"plied, and science and skill can extract;" and the conclusion follows, that, more than is produced cannot be taxed.

But we deny that this is a tax. We have already adverted to this position, and now return for a brief elementary discussion:

The word *tax* in its general sense, includes all contributions, imposed by the government, upon individuals, for the support of the State, by whatever name known, whether tribute, tithe,

(*a*) 2 Wallace, 200.

talliage, impost, duty, gabel, custom, subsidy, aid, supply, excise, or other name (*a*).

For the derivation and original use of this word, as used in our law, see Lord Coke's exposition of (*b*) the statute entitled: De Tallagio non Concedendo:

"No talliage, or aid, shall be taken or levied by us or our "heirs in our realm, without the good will or assent of arch- "bishops, bishops, earls, barons, knights, burgesses and other "freemen of the land."

"Tallagium, from the French *tailer*, to share, or cut out, and "metaphorically, is taken when the King or any other hath a "share or part of the value of any man's goods or chattels, or "a share or part of the annual revenue of his lands, or puts "any charge or burden upon another.

"Tallagium is a general word, and doth include all taxes." * * * (*c*).

Taxes mean pecuniary contribution; performance of bodily labor, on the highway, is not "payment of taxes" (*d*).

The word "Taxes" means burdens or impositions, put or set upon persons or property, for public use(*e*).

It would also seem to follow that any tax, laid on the citizen, without the intervention of property, is a direct tax; and any tax, laid on property or privileges, and required of the citizen only through his ownership or exercise, is an indirect tax.

It would also seem that there must be "subjects of taxation," "sources of revenue," in order that the tax may be taken for the support of the Government.

A poll tax falls directly,—and may only be collected directly of the citizen; but an impost upon land, a duty on imports, or an excise on manufacture, may be charged upon the land, import or manufacture, and the thing may be seized, or so much thereof as may be necessary to satisfy the due proportion, without any reference to the owner; yet, the tax falls indirectly on the owner, whether infant, feme covert, alien or citizen.

And there must be some persons and some things, not sources of revenue, nor subjects of taxation: a helpless idiot

(*a*) Story on Const., S. 947.
(*b*) Stat. 34, Edw. 1.
(*c*) 2 Co. Inst., 532.
(*d*) Overseers of Amenia v. Overseers of Stanford, 6 Johns, 93; Town of Pleasant v. Kost 29, Ill. 490
(*e*) Matter of the Mayor of New York, 11 Johns 77, p. 80; Sharp v. Spier, 4 Hill, 82; 2 Co. Inst., 532.

can not be made a subject of direct taxation, nor a babe; yet, either may own property and be indirectly taxed through it; and the tax will depend on the accident of ownership.

Yet, Congress may lay and collect taxes, and make all laws necessary and proper to do so.

Suppose, ten years ago, it had taxed all persons, black and white, and had prescribed that all infants who had nothing, should be sold to pay the tax.

The provisions of the amendments to the Constitution, as to due process of law, did not extend to the blacks (*a*). Yet no Judge would have admitted that the infant was taxable, or could be a source of direct revenue.

Nor can a tax be imposed upon a crime; a crime can not be seized, neither can a tax be made out of it; no one can have a franchise in it, and it can only be remedied by a criminal prosecution.

It would appear, then, that these taxes can not be laid on the crime of having the deficiency; and they do not purport to be.

But they are laid upon the deficiency, and that deficiency is about 10,000 gallons of spirits, which never existed; and that which never existed, is nothing; and nothing is not a source of revenue. Yet, this tax is either laid on nothing or on the defendant.

It must be a direct tax upon him, or must reach him through his property. If not a direct tax upon him, it lacks this essential element of a tax: *a subject of taxation.*

The subject of taxation was analytically discussed by Chief Justice MARSHALL, in delivering the opinion of the Court, in Gibbons v. Ogden(*b*), in this manner:

"Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division.

"We are accustomed to see it placed, for different purposes, in different hands; and a power in one, to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another, to take what is necessary for other purposes.

"Congress may lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States.

"This does not interfere with the power of the States to tax

(*a*) Dred Scott v. Sandford, 19 How.
(*b*) 9 Wheaton, 199.

"for the support of their own Governments; nor is the exercise "of that power by the States, an exercise of any portion of "the power that is granted to the United States." * * *

And, later, principles were laid down by the Supreme Court, in the case of Dobbins v. The Comrs. of Erie County(*a*), as follows(*b*): "Married women and children have privileges and "protection, but they are not assessed, unless they have goods "or property, separate from the heads of families.

"The necessity for money for the support of States, fixes "the obligation on the citizen to pay taxes,— * * * and "the only sense in which a tax is a personal charge, is, that it "is assessed upon personal estate, and the profits of labor and "industry. It is called a personal charge, to distinguish it "from the tax upon lands and tenements, which are enforced "without any regard to the persons who are the owners.

"Taxes are never assessed, unless it be a capitation tax, "upon persons as persons,—but on account of their goods, "and the profits made upon their professions, etc.

"They are so imposed, because public revenue can only "be supplied by assessments upon the goods, *i. e.*, the estate "and effects which every one hath.

"Taxes regard the persons of men, only because of their "goods. The goods, then, are taxed, and not the persons. "But those who are to pay, are taxable persons, because they "are under an obligation to contribute, from their means, to "the necessity of the State.

"The obligation, however, only becomes a charge upon the "person, in consequence of the power of the State to enforce "the payment of taxes by coercion. This power extends to "the sequestration of the goods and imprisonment of the "delinquent.

"A tax, according to the object upon which it is laid, may "be a personal charge; but that is a very different thing from "its becoming a charge upon the person in consequence of the "coercion which may be provided, by law, to enforce the "payment."

(The coercion is, to compel the citizen to separate the tax, which belongs to the State, from the balance of the property, which is his.)

The Bank Tax case, 2 Wallace 200, already cited, and the cases affirming it, in 3rd, 4th, and 5th Wallace, affirm the doctrine that taxes are laid upon persons *or* property; and if laid

(*a*) 16 Peters, 435.
(*b*) p. 446.

upon property, no false name or arbitrary assumption can conceal or alter the actual fund from which the government may compel the owner to separate it, or may itself take it without reference to him.

This is not a valid tax; and if not a valid tax, is no tax, for one or more of the foregoing reasons, viz:

It is laid, or charged, upon no subject of taxation or source of revenue,—nothing.

As a direct tax, it is not apportioned by the census.

As an excise it is not uniform.

It is exacted from the citizen, only by intendment and forced construction, and neither are permitted to take away the property of the citizen.

In this view this statute seems highly penal: If the distiller truthfully returns every gallon he makes, and is guilty of making less than 80 per cent. of the capacity of his distillery, or 14 quarts for every bushel, a payment, proportioned to the deficiency is required of him. Because he has not produced the amount, this charge is required. If he had produced it, *it* could have paid the amount. Because he did not produce it, *he* shall pay an equal amount.

This, then, is a retribution, conditioned upon his not producing the amount required.

And as a penalty implies a command or prohibition(*a*), the failure to produce, is a violation of the law; and the proper mode of enforcing *its* penalties is, by criminal prosecution.

The word "penal" is defined: That which may be punished; that which inflicts a punishment(*b*).

And *a penalty* is, a retribution, conditioned upon the doing or not doing of an act, and is inflicted either by virtue of a violated contract or a violated law.

A *crime* is the violation of a law.

And the penalty for violation of law is, therefore, a penalty for crime(*c*).

Congress has no power to require the distiller to produce 14 quarts, or any amount arbitrarily estimated, as the capacity of the distillery.

The authority of Congress to regulate commerce, between the States, and with foreign nations, is exclusive; and the States are without any authority on that subject(*d*), and the

(*a*) Dwarris.
(*b*) Bouvier Law Dic.
(*c*) See Armstrong's Foundry, 6 Wallace, 766.
(*d*) Gibbons v. Ogden, 9 Wheaton, 1, pp. 199, 200.

converse must be true, that the power to regulate the domestic trade and internal policy of a State—a power reserved to the States, and not granted to Congress —, is exclusive in the States; and Congress has no power over it.

And this doctrine is settled by the License Tax cases (*a*).

That this matter of production is within the authority of State regulation, needs little argument: The production of these amounts of spirits from grain, infuses large amounts of fusil oil and other matter deleterious to its quality, and the rapid distillation materially depreciates its value for many purposes. Inspection laws and provisions, on this behalf, are legitimate subjects of State authority.

The hours of labor and the amount of grain, which may be permitted to be used for these purpsoes, are also within its province; and in a time of scarcity, I believe there have been instances where the quantity, so used, was limited by State statute; and further, the State might require the distiller, under penalty, to produce a given amount from every bushel.

It is not a case of concurrent jurisdiction,—for both can not exercise it; and if the power to regulate resides anywhere, it is in the State.

Webster defines *an excise* to be, an inland duty, impost or tax, laid upon articles *produced* and consumed:

Also, on licenses to deal in certain commodities. Burrill's Law Dictionary, Wharton's Law Dictionary, and Blackstone and Stephens unite in this definition.

And Webster defines *a tax* to be, a rate or sum of money assessed on the *person* or *property* of a citizen, by government, for the use of the nation or State.

And no amount of search can, in my opinion, find any authority to weaken or vary either of these definitions.

Now, if this is a tax laid upon the *person* of the plaintiff, the Constitution(*b*), strikes directly at its root: "No capitation, "or other direct tax, shall be laid unless in proportion to the census;"—and this is in proportion to deficiency.

It is not laid upon property, for that never existed.

It can not be an excise or impost, for they are only laid on things produced,—and this was not produced.

Nor is it a duty; for, that is laid only on imports and exports.

If a tax is laid, it is laid on the plaintiff; and that is a direct tax.

But is it a tax?

(*a*) 5 Wallace, 470 and 471, and Pervear v. The Commonwealth, ibid., 477.
(*b*) Art. 1., Sec. 9, 3.

"A rose would smell as sweet by any other name," and a tax, possessing all the inherent qualities of a tax, could be collected as a tax, by whatever name it is called.

Therefore, we will present parallel enactments:

Every distiller, who shall fail to produce 14 quarts of spirits from each bushel of grain, shall forfeit and pay to the United States, 50 cents per gallon upon the amount of such deficiency.

Every distiller, who shall fail to produce 80 per cent. of the producing capacity of his distillery, shall be fined 50 cents per gallon, for every gallon of such deficiency; and all such fines and forfeitures shall be assessed by the assessor of the district wherein such distiller resides, and shall be collected, by the collector, by distraint, or otherwise, as the necessities of the case may require.

Every distiller, who shall fail to produce 80 per cent. of the capacity of his distillery, shall pay, to the United States, the sum of $1,000; and, at the expiration of each month, the assessor shall ascertain the producing capacity of the several distilleries within his district, and shall enquire and determine, whether or not the several owners thereof have produced 80 per cent. of such producing capacity, and shall issue a warrant to the marshal or collector of such district, against any distiller whom he may find delinquent, commanding him to make, levy and collect the sum of $1,000 by distress of goods, imprisonment of body, etc.

Every distiller, who shall fail to produce 80 per cent. of the capacity of his distillery, shall pay, to the United States, the sum of $1,000; and all grand juries shall enquire therefor, and courts shall try all indictments found therefor, and shall pronounce sentence, and issue execution therefor.

These, all, have the same characteristics; and the characteristics determine the name they ought to bear, and the proper mode of collection.

The name of *penalty* covers every quality; the inquiry by the grand jury is the only one which appears clearly proper; and, if the action of the criminal court is proper, no other tribunal has jurisdiction.

Upon the argument of these cases below the Court propounded the following quere.

Can the legislature say to distillers: We lay a tax on what you produce. It is difficult to find how much you really produce; therefore, our agents shall, from time to time, estimate how much you can produce, and you shall produce and pay the tax on 80 per cent. of these amounts, or stop?

To which I answered: 1st. It can not;

2nd. It has not; and, on the first answer, said:

It is adjudged(*a*) affirming the doctrine of *McCullough* v. *The State of Maryland*, that—delicate as is the dividing line between State and National authority to regulate business—it is ascertained by the extent of sovereignty, and that, when the limit is ascertained and fixed, all perplexity and confusion disappear. "Each is sovereign in its sphere of action, and "exempt from the interference or control of the other, either "in the means employed or functions exercised."

It is further adjudged(*b*) "that the national Government, "though supreme within its sphere, is one of limited jurisdic- "tion and specific functions. It has no faculties but such as "the Constitution has given it, either expressly or incidentally, "by necessary intendment. Whenever any act, done under "its authority, is challenged, the proper sanction must be found "in its charter, or, the act is ultra vires and void." The test must be applied in the examination of the question before us.

Congress has power to regulate commerce between the States, and with foreign nations, and the States have no authority over it, whatever; "but over the internal com- "merce or domestic trade of the States, Congress has no "power of regulation or direct control this power of regu- "lation is exclusive in the State"(*c*).

The right of taxation in Congress, is not inconsistent with the right of the State to regulate; but Congress must lay its tax on existing subjects. It can not call them into existence in order to tax them(*d*).

All this has been adjudged in terms; and it follows that, as Congress has no power of regulation, or direct control, every regulation must be such as is strictly incidental to taxation,—and so it is also adjudged.

And it follows that the question, whether the tax can be laid on the basis, named in the quere, is the only one before us.

We have proved by arguments, which have not been attempted to be met, that the tax must be laid on something; and this Court has affirmed as a fundamental rule, that the tax must be laid on existing things(*e*).

To support an affirmative answer to the quere, the estimate

(*a*) Bank of Commerce v. New York City, 2 Black., p. 634 and 635.
(*b*) Pacific Ins. Co. v. Soule, 7 Wallace, p. 444.
(*c*) License tax cases, 5 Wallace, 470.
(*d*) Ibid., p. 471.
(*e*) 5 Wallace, 471.

of 80 per cent., under the rules fixed by Congress, must be *conclusive evidence* of the amount produced; for if not conclusive evidence of the fact, the real facts would have to be examined, and the excise laid in accordance with them, to be "uniform;" and if not uniform, it would be void, in toto.

And the question resolves itself into this:

Can Congress fix an arbitrary rule, of conclusive evidence, as to the amount produced? The answer is negative.

1st. The Legislature may require a judicial tribunal to receive evidence, excluded before; may require the hearing of matters as evidence, which were not evidence before. But it can not weigh evidence, and decidewhat a jury or a court shall believe, where evidence is conflicting. This is an attribute of judgment, a judicial act; yet, this is just what the legislature would do, by prescribing *conclusive evidence.*

In the case at bar, it is admitted, that the amounts reported are all that the party has produced; if put in issue, it would have been proven beyond the possibility of a doubt. Yet, the estimate of 80 per cent. of capacity, if conclusive evidence would require court and jury to return, as their verdict and judgment, that which had been proven, beyond the possibility of a doubt, to be false;—and the trial would, in fact, be not by court or jury, but by the Legislature, and that, without hearing or evidence.

2d. The practical result of such an arbitrary rule is, to place the Constitution in the power of Congress.

For, if Congress can suppress the real facts, and make its edict conclusive evidence that false bases of taxation are true, it may ignore real uniformity altogether.

Only the courts can construe statutes: the judicial department alone can decide whether the fundamental Statute, commanding uniformity, has been violated; and the Legislature can not wrest the decision, directly or indirectly. The whole judicial power of the United States is vested in the Courts; and no power to control their judgment, directly or indirectly, was ever given to Congress.

The distillers might answer the Legislature:

"You lay a tax on what we produce. We report what we produce and pay your tax. You say we lie, and, it is difficult to find what we produce:—the issue is fairly joined; and the presumption is, that we are not guilty. You are a party, and can not be a judge in the cause. Submit the cause to the courts, or to assessors, chosen so as to be unbiased, and sworn

to try the issue and a true verdict give, according to the facts. There is some difficulty in this; and the Court or assessor, unbiassed by arbitrary instructions, may find the facts against you; yet, the difficulty is only such as is necessary to the protection of the rights of freemen."

In our quere, Congress says to the distillers: "*You must produce, and pay tax on, 80 per cent., or stop.*"

It can not regulate or directly control them, and can only stop them for a failure to pay the tax, or do their duty under the law.

It is not their duty to pay the tax on 80 per cent. unless they produce it, for that would not be uniform excision; therefore, it is necessary that Congress require them to produce that amount, if it requires them, under penalty, to pay it. "*You must produce*," is no less than regulation and direct control, which is beyond the power of Congress(*a*).

It is bringing a thing into existence, in order to tax it, and contravenes the principle laid down, "Congress must lay the "tax on existing things." * * * * "It can not bring a "thing into existence, in order to tax it. If Congress had the "right to regulate, it might regulate by licenses, or any other "way, as well"(*b*). If it had the power to call the subject into existence, the tax might be a royalty, or bonus, and not a tax; and no uniformity would be necessary; but,—we have seen that it has no such rights.

Then, the only manner in which the quere could be answered in the affirmative, would be, by saying that, as Congress had imposed the rule, any one who runs his distillery, started it with his eyes open, *cum onere;* and if he will not bear the burden, he may stop.

1st. This contravenes the right of every man to acquire, possess and enjoy property.

To acquire: by all lawful trades and vocations, which he may exercise, as parcel of the common liberty of every man, subject only to such regulation as is exclusively within the authority of the State Government.

To possess and enjoy: in using it to acquire other property, —for experiments,—in running one day and stopping the next, and producing from it such results as of his own free will he may determine:—this is free enjoyment.

2d. The effect of this *cum onere*, appears first in these cases:

(*a*) 5 Wallace, 470.
(*b*) 5 Wallace, 470.

Each distiller had acquired and possessed his respective distillery, before the passage of this Act; and it is now proposed to forbid the enjoyment of their property, except *cum onere:* with the burden of a regulation by Congress, which, it had been adjudged, Congress can not make.

If we admit—what was not the fact—that these distillers were not enjoying their property, in using it in pursuing their lawful trade within this State, at the time of the passage of the Act, but were sitting idly, and only started after obtaining the license and voluntarily placing themselves under the control of the Act (a proposition false in every particular), we should have an instance parallel to any other divestiture of liberty by Congress, and a subsequent assumption of the maimed franchises *cum onere*, or of any other instance of a citizen releasing his individual absolute rights to Congress, by implied contract.

Thus, if a citizen,—being abroad, having learned that Congress had abolished the trial by jury, on account of the difficulty attending the trials, and the uncertainty of their results,—should return, he would come *cum onere*, and the statute would be valid as to him, because he voluntarily entered its domain.

Or, the citizen at home begets a child, *cum onere*, and posterity is deprived of constitutional liberty by an implied contract.

Or, should Congress enact that every person, who shall hereafter purchase land from the United States, and settle thereon, shall be debarred from the trial by jury for crimes against the United States—would any man buy *cum onere?*—Most certainly not.

The Government was established to preserve the blessings of liberty to the people and their posterity. No individual can contract away his inalienable rights; and no authority was ever delegated to Congress, or any department of Government, to become a party to such a contract; therefore, the contract must fall for want of parties.

1. We have seen(*a*) that the imposition of a license tax and the issue of a license by the United States, does not, and can not authorize a business, forbidden by a State, or, under State regulation required to be exercised in a particular manner and under certain regulations, only; that the taxation is the simple operation of taking a certain share from the profits of the

(*a*) By the License Tax cases, 5 Wallace, 470, and Pervear v. The Commonwealth, ibid 477.

business, if exercised, but does not imply authority in the general Government to supersede, in any manner, the complete authority of the State over the business, exercised within it.

2. We have also seen, in the Bank Tax case(*a*), and the other authorities, cited in argument, that taxes are laid upon persons or property; and if laid upon property not taxable, or upon a valuation or estimate, made to evade or remove the difficulty in finding the actual property, which must, in fact, bear the burden,—such levy and such attempts to remove the difficulty, must be futile, and the levy must be void;—that the property itself is the thing that must be reached, and if not taxable, the arbitrary valuation can not evade or remove the difficulty, and make it so.

Now, what difference does it make, if, when we go behind the arbitrary valuation, we find United States bonds (which are for purposes of taxation, notning) or (literally) nothing? The subterfuge of arbitrary valuation can not make the bonds, which are nothing taxable, into something taxable; nor can it make nothing at all into something.

But this Bank tax case is still nearer ours: in going behind tbe arbitrary valuation, it was found to represent and be composed of some property, which was taxable, and some United States bonds, which were not taxable. And we, going behind the subterfuge, by which it is attempted to evade the difficulty, find some spirits produced, which are taxable, and some non-existent, which are not taxable.

This Court held that the subterfuge could not fasten the tax on the untaxable bonds, and as to them the statute was void; or, that the State could not compel the owner to pay a sum equal to the tax on the taxable and untaxable property, by any name.

And the principle covers our case, and takes the untaxable non-existent articles out of the operation of the statute, and makes the statute, requiring the distiller to pay the amount, void.

The query is answered;—Congress *can not.*

To make assurance doubly sure, we show that Congress *has not:*

SEC. 1, Requires the distiller to pay 50 cents per gallon, on every gallon "produced." Nothing in the section goes beyond the actual production.

(*a*) 2 Wallace, 200.

SEC. 59, Requires the payment of $4 for each "barrel produced," and says nothing about any other.

SEC. 13, Lays a daily tax upon the capacity, of 10 cents a bushel, that is, 10 cents on every 45 gallons of fermenting tubs.

All these provisions tax existing things.

SEC. 20, Is the one that attempts to tax the deficiency which does not exist; but it does not succeed. The United States Attorney, in the court below, expressly disclaimed all argument, and told us there was a hiatus, a chasm, between the 45 gallons of beer and the spirits.

The Legislature have left out some words; the Court can not supply them(*a*).

The hiatus is evident: The Assessor is commanded to ascertain whether the distiller has accounted for all the spirits produced by him; and, to determine the amount, the quantity of the materials used, shall be ascertained, and 45 gallons of beer shall represent a bushel of grain. That is as far as the section goes. There is a whole section left out; the chasm is apparent, and it is absurd to try to connect together two clauses of a statute that evidently refer to different things.

The Assessor is directed to ascertain the materials used; 45 gallons of beer to represent a bushel of grain. The next words are: "In case the return of the distiller shall have been "for less than the quantity thus ascertained." Construe the parts together, and it reads: "In case the returns (of materi- "als used in the preceeding month, made under Section 19) "shall be less than the quantity (of materials) thus ascertained "(by estimating 45 gallons of beer as a bushel) the distiller "shall be assessed for such deficiency, at the rate of 50 cents for "every proof gallon." Now, as the deficiency is in the materials, *i. e.*, grain used, it is evident that this tax is to be assessed, 50 cents on each proof gallon of the grain used.

A proof gallon is not defined in this Act; though, as proof spirits is, we may suppose, that a proof gallon means a gallon of proof spirits, but do not know; and this Section, if to be construed together, clearly refers it to grain.

The next clause involves us in hopeless absurdity; and, unless we can fill the hiatus and tell how much spirits Congress intended should represent a bushel of grain, we can but guess at its intention.

The statute nowhere states what amount of proof spirits shall represent a bushel, and we have no hint even at the intention.

(*a*) Dwarris 578 and 598.

The Commissioner has assumed 14 quarts as the representative, in estimating the producing capacity; but it is evident that 14 quarts was not intended to be interpolated in this hiatus; for, the Assessor is only required to bring the estimate up to 80 per cent. of the producing capacity. Thus, if the fermenting capacity is 100 bushels per day, the producing capacity is 1400 quarts per day, and 80 per cent. of this is 1120 quarts per day; and it would seem that Congress intended that a bushel of grain should represent not less than 11.20 quarts of proof spirits.

Further, the break is so short, and the commencement so abrupt, that we have no right to assume that Congress intended to do as the Commissioner supposes. It would be equitable, and in accordance with sound justice, for Congress to supply a rule for estimating the true producing capacity of the distillery, from the grain actually used, viz: the amount of spirits which the distillery was capable of producing from the materials actually used, considering all the favorable and unfavorable circumstances which surrounded it.

And this seems to have been the intention; for there is no requirement that he shall refer to the abstract survey, but to the materials actually used.

In making the estimate,—the notice of the distiller,—the abstract producing capacity, ascertained by the surveys,—the books of the storekeeper, and other matters furnished by the statute, would be of great assistance: And from all these aids the assessor might estimate what, under all the circumstances, the distillery might be fairly expected to have produced. He shall then form his judgment of how much it did produce, and assess the deficiency. But the last clause of the Section provides that, as the assessor may be inclined to indulge his doubts, and lean towards lenity (?) too much, he shall not allow them to carry him more than 20 per cent. below the amount he has estimated as fairly to be expected from the grain actually used, and the circumstances surrounding the particular case.

This supposed Section would make the statute, in this particular, clearly constitutional, just and reasonable, careful of the citizen's rights, yet, obtaining the entire due of the government.

And, as we must construe statutes, where the words will permit, in harmony with the Constitution, justice and reason, we must certainly suppose the Legislature intended to fill the chasm with a provision, which would make the statute consti-

tutional, reasonable and just. What the provision would be like, we may suppose. What it would have been, we do not know. Therefore, the matters, which were evidently intended to hang upon it, must fall; and Section 20 is void, for uncertainty.

RECAPITULATION.

In this argument we have scouted the construction put by the Commissioner on Section 4: That, because the disagreement of the Courts in different parts of the country, as to the proper construction of the Acts, frustrated the uniform enforcement of them, therefore Congress intended to enable the *Internal Revenue Office* to control the construction(*a*).

Congress never intended to divest the Supreme Court of the authority to adopt the true rule. That Court is always open to the appeal of the United States, and Congress never intended to transfer its functions and judicial authority to a subordinate executive officer. There would be no excuse, not even that of urgency; for, Congress could have required the Court to give precedence in such matters, above all others, and thus have secured a decision as early, at least, as the *Internal Revenue office* gives it.

The District Attorney, in argument, agreed in this view; and I would pass it, but that another step is taken by the department, on the assumption that it has the judicial right to determine the true construction of the Act. This is found in the following, cut from the daily associate press report:

"To DISTILLERS."

"A case of considerable importance to distillers has just "been decided at the Bureau of Internal Revenue. W. O. "Watts appeared for certain Western distillers to claim abate- "ment of deficiency tax, levied because the distillery did not "produce eighty per cent. of its surveyed capacity. It was "proved to the satisfaction of the department, that the owners "had acted in good faith, and had worked as many days as "possible under the circumstances.

"The decision was, that, every effort having been made to "comply with the law,—while under the ruling and practice "of the department it did not furnish ground for abatement, "—it formed a basis for asking a compromise; and under this "a compromise was effected, reducing the payment to $18,000, "and the dismissal of a suit for recovery, already instituted."

Congress may lay taxes, subject to two unbending conditions: Direct taxes must be proportioned to the census; excises, &c., must be uniform.

(*a*) See Appendix post.

This judicial authority decides what is the law; and then, as an executive officer, proceeds, not to execute it, but to compromise or sell immunity.

It decides what is uniform taxation, and then proceeds, deliberately, to destroy the uniformity, by accepting less.

The position is monstrous. If the defendants are bound to pay, every man is bound to pay, by the same rule; and the Commissioner may not enforce a suit against them for the whole amount, and sell out to others, according to such rules or caprices as may, at the time please him.

We scout the proposition, but use the instance to show, that even the Executive believed, with us, that Congress did not intend to make an unvariable rule, that a distiller, who had paid on all he had produced, should pay on the arbitrary amount which the Commissioner has fixed.

In the argument we have shown that, by well established rules of construction, our case is excepted out of the statute, whatever meaning its language may appear, at first, to convey.

That, by equally well established rules, all ambiguities must be construed in favor of the citizen; and that the ambiguities are many.

That the construction must be strict against the United States,—liberal in favor of the citizen;—that the intention of Congress must be taken most strongly against itself, and in favor of the citizen; for, Congress is ever at hand to make its intentions clear, while the citizen has no remedy.

That, by the Constitution, if Congress has commanded, the *sic jubeo* is void; and on this, also, the decision must be in strictness against Congress, equitably for the citizen.

This branch includes: the collision of authority between State and National legislation,—the construction of the grant to Congress,—the question, whether this is penal; and also the point, that the rule, established here and now, will be the rule hereafter. And the rule, as to what is conclusive evidence of the amount produced, runs through, not only suits in debt, but suits for forfeitures and criminal proceedings.

I pray your Honors to preserve the invariable rule that *the law favors liberty(a)*,—and obey and be bound by the supreme law of the land, and not withdraw your august power from the protection of the citizen and the fundamental law.

Respectfully,

Edward Roby,
Of counsel.

(a) Dwarris 674.

APPENDIX.

INSTRUCTIONS *to suppress the unauthorized production of alcoholic spirits and vapors.*

TREASURY DEPARTMENT, Office of Internal Revenue,
Washington, July 25, 1868.

The provisions of section four of the Act of July 20, 1868, are as follows:

Sec. 4. *And be it further enacted*, That distilled spirits, spirits, alcohol, and alcoholic spirit, within the true intent and meaning of this act, is that substance known as ethyl, alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses or sugar, including all dilutions and mixtures of this substance; and the tax shall attach to this substance as soon as it is in existence as such, whether it be subsequently separated as pure or impure spirit, or be immediately or at any subsequent time, transferred into any other substance, either in the process of original production or by any subsequent process; and no mash, wort, or wash, fit for distillation or the production of spirits or alcohol shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort, or wash so made and fermented, shall be sold or removed from any distillery before being distilled; and no person other than an authorized distiller shall by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; and no person shall use spirits or alcohol or any vapor of alcoholic spirits in manufacturing vinegar or any other article, or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery and the tax thereon paid. Any person who shall violate any of the provisions of this section, shall be fined for every offense, not less than five hundred dollars, nor more than five thousand dollars, and imprisoned for not less than six months nor more than two years: *Provided*, That nothing in this section shall be construed to apply to fermented liquors.

The objection of this section was evidently to enable the Internal Revenue Office to suppress all manner of distillation of spirits not expressly authorized by law, and to collect the tax on all alcoholic spirits manufactured. The laws existing prior to this act were found to be inefficient, and all efforts to secure a uniform enforcement of them, were frustrated by a disagreement among the courts in different sections of the country as to the proper construction of such laws. The

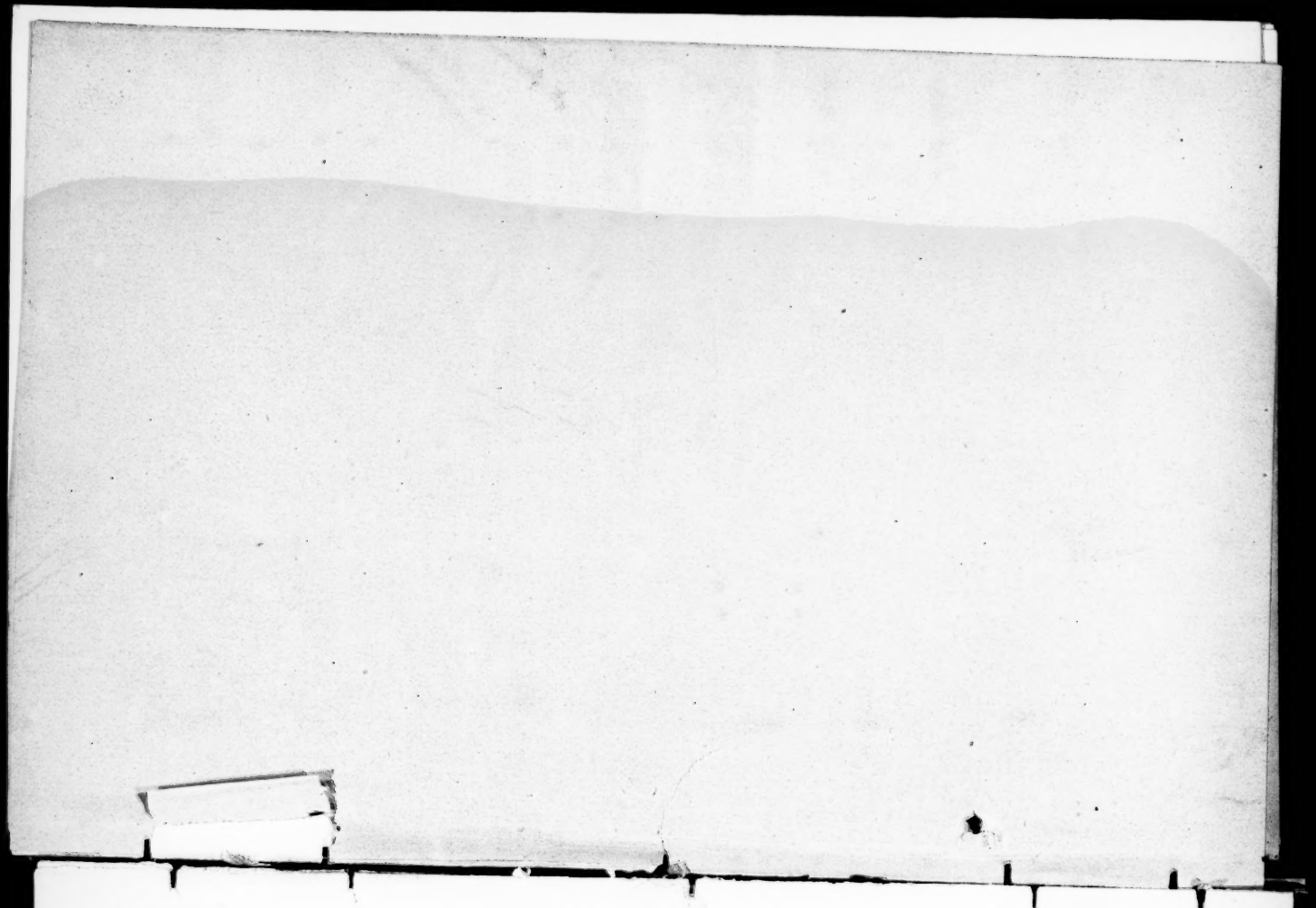
meaning of this section, however, can not be a matter of doubt. Under it, no article into which alcoholic spirits or alcoholic vapors enter as an ingredient can be lawfully manufactured, except such spirits or alcohol have been produced in an authorized distillery and have paid the tax.

The largest class of cases affected by this section is that of the manufacturers of vinegar by various processes of distillation. Many of these manufacturers have been honestly engaged in the business of making vinegar with no intention to defraud the revenue; while many others, under the pretence of making vinegar alone, have been committing flagrant and intentional frauds. Between these two classes Congress has made no discrimination, and the provisions of this section were intended to close all such manufactories.

In order that equal and uniform justice may be done to all persons engaged in this business, assessors and collectors will at once take steps to advise those in their respective districts of the terms of the law, and the purpose of the department to require full compliance with its provisions; and if any one carries on, or attempts to carry on, the business prohibited by this section, after being so advised, they will institute proceedings under its penal provisions.

E. A. ROLLINS, *Commissioner.*

See also the argument filed by me in *Mason* v. *Rollins*, pp. 345 to 355.



Supreme Court of the United States.

No. 274.—Mason *v.* Mann *et al.*

No. 275.—Mason *v.* Hart *et al.*

No. 434.—United States *v.* Singer *et al.* 15-111

No. 435.—United States *v.* Van Buskirk *et al,* 15-123

Distinction between direct taxes, and duties, imposts and excises.

By Edward Roby.

Supreme Court of the United States.

No. 274.—MASON v. MANN ET AL.
No. 275.—MASON v. HART ET AL.
No. 434.—UNITED STATES v. SINGER ET AL.
No. 435.—UNITED STATES v. VAN BUSKIRK ET AL.

Distinction between direct taxes, and duties, imposts and excises.

Having referred the Court to the Briefs filed by me in No. 434, U. S. v. Singer et al., and No. 435, U. S. v. Van Buskirk, I now present, by additional authorities, only one point or phase of the cases, viz:

If this tax violates either the rule of Uniformity or of Apportionment it is void: that is, if it is a direct tax it cannot be laid except in proportion to the census; if a duty, impost or excise, it must be uniform.

As there exists no property to tax; only a deficiency; a nothing, and yet a person is required to pay, we will analyze the subject to ascertain to which class it belongs. First premise, from the derivation of the word TAX, from *Taxo*, or more properly *Tango;* to touch or take from, (Scheller Latin Dic.,) includes every revenue which can be taken from the citizen for the support of the state.

TALLAGIUM; "from the French *tailer;* to share or cut out;" * * this "is a general word and doth include all taxes."—(2 Co. Inst., 532.)

It will be seen that at the early period when this word was used thus, there were no taxes except those laid upon persons with respect of their property. Villeins were slaves, and free men without property were the personal

retainers of the knights, who were taxed by the number of knights' fees owned, socage tenants by annual value, burghers, &c., by annual income or personal property.

EXCISE: Must of necessity have meant to cut out; and of like necessity must have applied only to property.

IMPOSTS: from *impono;* to place upon; in the old law written impositions; could of course have covered any burden laid upon a person or property, but in its application we shall see that it was limited to property.

DUTY: derived from the feudal system; the render of feudal services and aids on account of tenements held. This word was finally extended to include all taxes on property, and to express the reciprocal of impost. The command of the sovereign imposing a reciprocal duty on the citizen in respect of his property.

We shall find that all duties, imposts, and excises, laid on persons in respect of their property, were from the beginning of English history, at all times and without exception, proportioned by some rule of uniformity.

And as capitation taxes had grown up with the emancipation from feudal bondage; recognizing the equality of all in the eye of the law, the equal share of every man in the right to govern, and the equal duty of every man to contribute equally, if called upon as a man to support the state; our Constitution requiring all taxes of that nature to be apportioned or assessed or laid in proportion to the census. The nature of the tax, and not the name by which it might be called, whether Poll tax, or Military tax, or Police tax, or Family tax, or by a name that denominated nothing, as assize or charge, was to control the application of the rule. Any tax laid upon the person, whether upon his head or foot or body, or in any other metaphor, was of the same class.

And we shall see that this was a mere recognition of a distinction which we find in the law books from the decline of the feudal system, between taxes on persons and taxes on persons in respect of their property.

In the former of which cases the persons are certainly taxed, in the latter they are not taxed, only the property, and this distinction is recognized in Dobbins v. Comm'rs of Erie County, (16 Peters, 435,) yet it imposes a duty and thus reaches the person.

(Of course it will be remembered that in the dark ages the use of words cannot be expected to be more perfect

than at present, and we cannot grade their meanings to the fineness of a hair; they are often used inaccurately, but the unanimity of the general result is astonishing.)

"*Land Tax.* A tax imposed in Great Britain on lands "and tenements, and on personal property by acts for- "merly passed annually for that purpose."

"The assessment or valuation of estates hereafter men- "tioned made in the year 1692, though by no means a "perfect one, had this effect, that a supply of half a mil- "lion sterling was equal to 1*s.* in the pound in the value "of the estate given in. And according to this valuation, "from the year 1693 to 1798, the land tax continued an "annual *charge upon the subject* above half the time at 4*s.* "in the pound; sometimes at 3*s*; sometimes at 2*s*; "twice at 1*s*, (A. D. 1732 and '3); but without any total "intermission.

"By statute 38, Geo. 3, c. 60, this tax as imposed by "the last annual act, 38 Geo. 3, c. 5, on lands and tene- "ments in Great Britain, is made perpetual, being fixed "under that act at 4*s.* in the pound.

"*A duty* of 4*s.* in the pound on pensions, offices, and "personal estates in England and Wales has, since that "time, been annually granted."

(*Tomlin's Law Dictionary.*)

That this word *duty* is not here used inadvertently will become apparent. The following expressions show that the tax was considered as laid upon the land or property itself: "By the act of 38 Geo. 3, c. 60, the land tax so "by that act made perpetual is also made subject to "*redemption* or *purchase* either by the owner of the land "liable to the tax, or on failure of redemption by him "within certain periods, then by any other person inclined "to purchase."—(Ibid.) Our authority proceeds: "By "the 4 and 5 W. 4, c. 11, continuing the *duties* on offices "and pensions, *those* on personal estates having been "taken off, * * * are placed to the account of the "consolidated fund."

"The ancient method of taxation was by *escuage*, which "was on land held by *knight service*, and by *talliage* on the "cities and boroughs.

* * * * * * *

"King Edward 1 confirmed to the people magna "charta which they had long contended for, and also the "charter of the forests; and for magna charta they

"granted the king a fifteenth by the name of quindeci-
"mam partem ominum honorum. * * *

"We find, in the times of Henry 8, Queen Elizabeth,
"and James 1, they raised both subsidies and fifteenths.
"This was because the value of things increased, and
"therefore the old fifteenths were not according to the
"then true value of the townships; and therefore they
"contrived that the subsidy should be raised by a pound
"rate upon lands, and likewise a pound rate upon goods."

This word *rate* is to be observed, as we shall find it used interchangeably with *charge*, and with our use of the word tax, though its specific use is to designate a tax according to numbers or values.

From the continuance of the quotation we would see that "after the Revolution, to support King William in "his wars with France, it was necessary to come into a "land tax, and from 1684 to 1693 the tax was made by a "pound rate like the former subsidies, * * * "and then they came to lay a rate on every county," and thus came to lay disproportioned sums on some counties.

In the same dictionary, title TENURE II, 6, we find: "AIDS, called by *Spelman* (Treatise on Feuds, 59) tribute, "and by our old authors *auxilia*, were mere benevolences "rendered by a tenant to his superior or lord in times of "difficulty or distress.—(*Bracton lib.* 2, c. 16, § 8. Fleta "*lib.* 3, c. 14, § 9.) These were not of direct feudal obli-"gation, but first obtained out of regard to the person "and occasions of the lord. * * * But as "*aids* grew frequent they became, in many counties, *es-*"*tablished renders of duty.* * * Two usual aids "were fixed (by Statute, *Westm.* 1, c. 36. Extended by "25 *Edw.* 3, c. 11, to aids required by the king,) as fol-"lows, viz: the aid of a knight's fee at 20*s.*, and of socage "lands of 20*l.* per annum at 20*s.*, and so pro rata.

* * * * * * *

"8. ESCUAGE is reckoned by *Lord Hale* among the per-"quisites of tenure.

* * "It was a pecuniary aid or contribution "reserved by particular lords instead or in lieu of per-"sonal service, the better to enable them to bear the ex-"traordinary expense of their own attendance and warfare "when the king made war on Scotland or Wales or upon "any foreign country, if the tenure so was expressed.—"(*Bract. l.* 2, *c.* 16; *Litt.*, §§ 95, 97, 100, 103, 155, 158; *Mad.*

"*Hist. Ex.*, 452; *Seld Notes ad Hengham*, 113.) * *
"It was usually proportioned to the fine received by the "king from his *tenants in capite* for failing to attend in "such expeditions.—(*Fleta lib.* 3, fol. 198.) * *
"Our kings anciently * * did sometimes, on "occasion of war, without summons, assess a moderate "sum upon each knight's fee as a scutage or escuage by "which they might be enabled to provide stipendaries. "But * * in the time of King John * * his charter "declared that no escutage should be imposed or assessed "*nisi per commune concilium Regni.*—(See *Litt.*, § 97; 1 "Inst. 72, *a; Magna Charta Cap.*, 37.)"

This review has brought us back to the feudal origin of this word, which our author thus defines: "DUTY.— "Anything that is known to be due by law, and thereby "recoverable, is a duty before it is recovered, because the "party interested in the same hath power to recover it.— "(1 *Lil.*, 495.)"

This is the only definition given by Tomlin to this word, and has the weight of contemporaneous construction touching the matter we are considering.

In Comyns' Digest, title DETT, (G. 1,) we read: "Every "person, who by any means is chargeable to the king, "shall be debtor to the king, for it shall be taken exten- "sive, as where he is answerable to the king for debt, "damage, duty, rent, arrear, &c.—Goldb., 295." (See also 2 Strange, 981; M., 1726; Bunb., 223; Comyn Dig. DETT, G. 7; G. 13; G. 14.)

(IBID.,) *title* HOMAGE (E) *Escuage.*

"He that holds his lands by escuage holds by knight "service."

"The services of chivalry proper were all personal, but personal attendance growing inconvenient, the tenants found means of compounding for it. This pecuniary satisfaction at last came to be levied by assessments at so much for every knight's fee; scutum being then a well-known denomination of money. It was called in Norman French escuage, being a pecuniary instead of a military service.—(2 Bl. Com., 74.)

The first time this appears to have been taken was in the 5 Hen. 2, on account of his expedition to Toulouse; but it soon came to be universal that personal attendance fell quite into disuse.

Hence we find in our ancient histories that, from this

period, when our kings went to war they levied *scutages* on their tenants, that is, on all the land-holders in the kingdom, to defray their expenses and hire troops.

Magna Charta provided that no scutage should be imposed without consent of parliament, such scutages being indeed the groundwork of all succeeding subsidies and the *land tax* of later times. Since, therefore, escuage differed from knight service in nothing but as a compensation differs from actual service, knight service is frequently confounded with it."—(2 Bl. Com., 74, 75.)

This identifies the payment of a land tax, with the duty of a subject to his sovereign on account of the land which he holds: and is the substitution of the modern revenue for the former personal assistance.

Blackstone in his Commentaries (written about 1758) says (1 Com., 308) "The taxes which are raised upon the "subject are either annual or perpetual. The usual an- "nual taxes are upon land and malt."

The form of the expression will be observed the taxes laid upon land and malt are taxes laid upon the subject.

"The land tax in its modern shape has superseded all the "former methods of *rating* either property or persons "with respect to their property."—(Ibid.)

In the subsequent pages we find the land tax considered as a rate of charge, of so much in the pound of value. And that a land tax is in fact revenue *paid by the subject* to the *sovereign*, superseding tenths, fifteenths, hydages, scutages and talliages (tenths and fifteenths being temporary aids issuing out of personal property): is a rate upon property, charged to persons in respect of their property; due from them; collectible by an action of debt: or the more summary methods of imprisonment of the body, distress of goods or sale of the estate in the land itself, because it is a duty.

"The perpetual taxes are—

"I. The Customs; or the duties toll tribute or tariff "payable upon merchandise exported or imported."—(Id., 313.)

"II. Directly opposite in its nature to this is the Excise "*duty* which is an inland *imposition*, &c."—(Id., 318.) Mr. Blackstone uses terms with accuracy. His ideas of sound policy in government were those of a mere sycophant to royalty and landed aristocracy (2 Dallas, 458) therefore we omit the remainder of this section.

"III. I proceed therefore to a third duty, namely, that "upon salt; which is another distinct branch of his majes- "ty's extraordinary revenue, and consists of an Excise of "3*s.* 4*d.* per bushel on all salt by several statutes of King "William and other subsequent reigns. It is not gener- "ally called an Excise because under the management "of different commissioners; but the commisioners *of the* "*salt duties* have, by statute 1, Anne, c. 21, the same "powers, and must observe the same regulations, as those "of other Excises."—(Id., 321)

"IV. Another considerable branch of the revenue is "levied with greater cheerfulness, as, instead of being a "burden, it is a manifest advantage to the public. I mean "the post office *or duty for carriage of letters.*"—(Ibid.)

"V. A fifth branch of the perpetual revenue consists "in *the stamp duties*, which are a tax imposed on all parch- "ment and paper whereon any legal proceeding or private "instruments of almost any nature whatsoever are writ- "ten; * * these *imposts* are very various according to the "nature of the thing stamped. * * In France and "some other countries *the duty* is laid on the contract "itself, not on the instrument in which it is contained. "* * The first institution of the stamp duties was by "statutes 5 & 6 W. & M., c. 21, and they have since, in "many instances, been increased to ten times their orig- "inal amount."—(Id., 323.)

Here we see the two generic terms used interchange- ably. An impost by the sovereign being the origin of the duty of the subject. Either word is used to express the same fact in its accomplishment.

The word stamp duties have a familiar sound, and re- flection or examination shows us clearly that colonial writers substituted the word tax for duty, because they denied the power of the government in which they were not represented to lay the tax, and repudiated the idea that that government could impose the duty of payment. They admitted that if represented in the government the reciprocal duty would have accrued. To-day no impost contains more of the insignia of this reciprocal duty than that which requires the citizen, in addition to his pay- ment to the revenue, to affix and cancel the evidences of payment upon a thousand articles which may remain in the most perfect obscurity.

"VI. A sixth branch is *the duty* on houses and windows.

"As early as the Conquest, mention is made in domesday "book of fumage or fuage, vulgarly called smoke-far- "things; which were paid *by custom* to the King for every "chimney in the house. And we read that Edward the "Black Prince, (soon after his successes in France,) in "imitation of the English *custom* imposed a tax of a florin "upon every hearth in his French Dominions. But the "first parliamentary establishment of it in England was "by statute 13 and 14, Car. II., c. 10, whereby an heredi- "tary revenue of 2*s.* for every hearth, in all houses pay- "ing to church and poor, was granted to the King for- "ever. And by subsequent statutes for the more regu- "lar assessment of this tax, the constable and two other "substantial inhabitants of the parish, to be appointed "yearly, (or the surveyor appointed by the crown, to- "gether with such constable or other public officer,) were, "once in every year, empowered to view the inside of "every house in the parish. But upon the revolution by "statute 1, W. and M., st. 1, c. 10, hearth money was "declared to be 'not only a great oppression to the poorer "'sort, *but a badge of slavery upon the whole people, exposing* "'*every man's house to be entered into and searched at pleasure* "'*by persons unknown to him;* and therefore to erect a last- "'ing monument of their majesties' goodness in every "'house in the Kingdom, the duty of hearth-money was "'taken away and abolished.' This monument of good- "ness remains among us to this day; but the prospect of "it was somewhat darkened when in six years afterwards, "by statute 7, W. 3, c. 18, a tax was laid upon all houses "(except cottages) of 2*s.*, now advanced to 3*s.*, per annum, "and a tax upon all windows if they exceed nine in such "house. Which rates have been from time to time varied, "being now extended to all windows exceeding six; and "the power is given to surveyors appointed by the crown "to inspect the outside of houses, and also to pass through "any house two days in the year, into any court or yard "to inspect the windows there. *A new duty*, from 6*d.* to "1*s.* in the pound, was also *imposed* by statutes 18, "Geo. III., c. 26, and 19 Geo. III., c. 59, on every dwel- "ling house inhabited, together with the offices and gar- "dens therewith occupied: *which duty*, as well as the "former, is under the direction of the Commissioners of "the Land-Tax."—(Ibid., 324.)

(This whole section, passing somewhat beyond the line

of our present argument, is quoted for its dismal picture of the condition of the people under the Revenue law of July 20, 1868. If their inquisition was "a badge of slavery upon the whole people," the enormities delineated in the case of Mason v. Rollins pass beyond the expression of superlative words; yet it was the inspiration of the revolution of 1688 and of this statute which removed "the badge of slavery," that dictated every line of the Constitution ordained to secure the blessings of liberty.)

Upon this we note, (1) that houses are essentially real estate in England; and a part of the land; as the house and its windows are incapable of severence a tax laid upon a house or window is essentially a tax on land, and in the last clause it is extended over the garden and curtilage. (2) This land tax is denominated a tax and described as coming clearly within the generic term duty. (3) The term duty is used as interchangeable with the other generic word impost in describing the tax.

"VII. The seventh branch of the extraordinary perpetual revenue is *a duty* of 21*s.* per annum for every male servant retained or employed." * * *

"VIII An eighth branch is *the duty* arising from licenses to hackney coaches." * * * * *

"IX. The ninth and last branch of the King's extraordinary perpetual revenue is *the duty* upon offices and pensions; consisting in an annual payment of 1*s.* in the pound (over and above all other duties) out of all salaries, fees, and perquisites of offices and pensions payable by the crown, exceeding the value of 100*l.* per annum. This highly popular taxation was imposed by statute 31, Geo. 2, c. 22, and is under the direction of the Commissioners of the Land-Tax."—(Ibid., 326.)

"All contributions *imposed* by the Government *upon individuals* for the service of the state, are called taxes:—by whatever name they may be known, whether by the name of tribute tythe talliage, impost, duty, gabel, custom, subsidy, aid, supply, excise, or other name."—(Story Const., §950.) We follow this author no farther in this section, though undoubtedly this sentence receives the approval of our judgment. Of the other words we have seen that "tallagium is a general word and doth include all taxes" then used.—(2 Co. Inst., 532.)

In Radford v. McIntosh (3 T. R., 632) the taxes on post-horses are denominated duties. So also in 6 T. R., 163,

11 East., 530; 8 East., 581, and case of The King v. Swift in the Exchequer given in the note; 8 East., 584; 1 Price, 317; 3 B. & Ald., 387; 1 B. & Ald., 166. See statement of this case.

"RATE. The valuation of every man's estate, or the "appointing or setting down how much every one shall "pay or be charged with to any tax."—(*Tomlin's Law Dic.*)

In *The King v. Brown* (8 East., 528) the word is used, and having seen in the earlier part of this subject of duties that the land tax is by valuation, we understand the force of the decision that "the estate that has once paid shall not be made to pay again," no matter how many subordinate estates there might be in the farm; the payment of the rate on the whole farm was required of the farmer, and payment extinguished the tax.

In the *King v. Sherborne* it was determined that the defendants were not ratable for stock which was bailed to them operis faciendi.

(See also on county rates, 3 B. & A., 72; on rating for parochial taxes, 2 B. & Ald., 570; on rating in respect of personal property having its actual situs in a parish, though not corporeally present, 1 B. & Ald., 109; on rating canal lands and personal property in proportion to other lands adjacent, 1 B. & Ald., 289.) 1 B. & Ad., 113. From the opinion of Garrow *Baron* in Attorney General v. Coote (4 Price, 183), on the application of "the Property Tax Act," which charges *a duty* of 1*s.* in the pound, on the annual profits or gains arising to any person residing in Great Britain; it seems that this *duty* is a tax on property at a certain rate.

See also on the use of this word 3 B. & Ald., 21, 454; 1 B. & A., 42.

In the articles of union with Scotland, by Art. 7, Excises on liquors shall be uniform throughout the United Kingdom. By Art. 9. When the land tax in England is 1,997,763*l.* 8*s.* 4½d. Scotland's quota shall be 48,000*l.* free of all charges; and so proportionably to be collected as the Cess now in Scotland.

And by Art. 8, Scotland shall be exempt from *the duty* on home-made salt.

So by Art. 10, from the duties on stamped paper, etc. by the acts then in force.

By Art. 11, from duties on windows and lights, which determine 1st August, 1710.

By Art. 12, from duties on coals, etc., till 1710.

By Art. 13, from duty on malt till 1707.

By Art. 14, from all other duties laid before the union except those consented to in this treaty.

So by Art. 15, Scotland shall have 398,085*l.* as an equivalent for the *customs* and *excises* with which Scotland after the union will be liable towards the debts of England. —(Comyn's Dig., title Scotland (D. 8.)

The Commissioners of sewers are authorized to tax, assess, charge, &c., *after the quantity of their lands*, tenements, rents by the number of acres, &c., after the rate of every man's portion, profit, &c.

Comyn's Digest, title SEWERS, E. 2, (10 Co. Rep., 143.)

Title "(E. 3.) When the charge shall be upon the owner" shows that when the tenure is to repair the owner shall be charged alone. So also when he has the land in his own right. But the fact that he and his ancestors have always repaired is not evidence of a tenure or prescription to repair; it is only evidence that the land is liable.

For non-payment of the assessment the remedy is by distress, by fines, amercements, etc., and by sale of the lands.—(Ibid., E, 6; E, 7; E, 8.) But the land cannot be sold "when the assessment is laid upon the land without naming the owner, *for some person ought to be assessed for such land.*"—(Ibid., E, 9; Callis, 162.) A "decree of the Commissioners for the sale * * shall bind all persons who at the making of the decree had interest in such lands in possession, reversion, or remainder. A feme covert, infant, and non compos will be bound."—(Ibid., E, 10.)

Stamp tax is classed as an *advalorem duty* on a lease, etc. (4 M. & S., 23; 2 M. & S., 88; 4 Taunt., 876; M. & S., 228; 4 B. & A., 204; legacy *duty*, 7 Price, 560. Advalorem stamp duty on a deed, 5 M. & S., 228; 1 B. & A., 477.)

Customs. This was the specific term by which import and export duties were denominated from *Rolle* down to the present.—(See quotations ante. Also Comyn's Digest, title TRADE, A, 1; A, 5; St. 3 Jac., 6; C, 1; C, 2; C, 3; C, 5; C. 5 b. is of "other duties," showing the synonym. 13 East., 506. 2 Blk., 1018. Loft., 204, 205.)

TYTHE: Comyn's Dig., title *Dismes.*

Tithes are included in the definition of taxes, and, having their origin in the system where the church was a state establishment, and its several divisions supported by this tax on specific divisions of territory, it becomes clear, from the examination of this title, that it was a tax attached to the land or territorial jurisdiction nearly uniform as to its application to all kinds of property which yield profit.—(See F, 1; F, 2; F, 3; F, 4; H, 5; H, 6; H, 16.)

The manner of their payments show them within the principle of a duty, although they did not have that name attached to their origin, like the payments of knight service.—(I, 1; 5 M & S, 166.)

Tithes are collateral to the land (A). Other ecclesiastical revenues were oblations due by custom or canon at a certain time, pensions and mortuaries.

Extra parochial tithes were due to the king (C, 3). All persons generally ought to pay their tithes to whom they are due, and therefore, of common right, all lands ought to pay tithes (D) (11 Co., 15, a,) and the occupier of the lands shall pay them.—(Id.) Some lands were exempt by prescription.—(Ibid., E, 5.) Some lands were discharged by payment of a commutation called a Modus decimandi, or recompense in discharge.—(Ibid., E, 10.)

From this it is apparent that as some were discharged altogether, and others paid a modus in lieu of the regular tax, it was far from uniform throughout England.

Lands held in ancient demesne had certain privileges which commenced by act of parliament.—(Comyn's Dig., title Ancient Demesne, A; per Holt, 1 Sal., 57.) And they shall be free from the expenses of knights in parliament, (F, 2.) Also, from taxes and talliages granted by parliament, if they are not specially charged, (F, 3.) So from toll, passage, and other duties for buying and selling in fairs or markets throughout all England.—(F, 4.) This exemption of a privileged class was substantially overthrown at the revolution and the land tax was laid uniformly throughout England.—(See statute post.)

TALLIAGES and AIDS appear to have been synonymous; not to be taken unless granted, with the assent of parliament, for the common profit of the whole realm.—(Comyn's Dig., PARLIAMENT, H, 910.) This title (H, 11) treats of customs, and also (H, 12) of tonnage and pound-

age, which were also for the safeguard of the sea; so much a ton for some goods and so much a pound for more valuable commodities.

(H, 13.)—A subsidy was an aid granted by parliament upon lands or goods, as for example, by one statute, 4*s.* by the pound upon land, and 2*s.* 8*d.* upon goods, and double upon the goods of aliens.

The fifteenth is also an aid granted by parliament; and it was at first *quinto-decima pars bonorum Mobilium.* By a commission it was ascertained in every town in England, and afterwards recorded in the Exchequer.

The manner of taxation by subsidy was by two taxers, who, being authorized by commission, chose a clerk to act with them, and these swore four or six in each county to make an assessment, which was returned by indenture.—(Id., Forst, 34. See also H, 14; H 15; H, 16; H, 17.)

Title PREROGATIVE (A.)—"The king's prerogative extends to all the liberties, privileges, powers, and royalties allowed by the law to the crown of England;" * * "*for the king has not any prerogative but such as the law allows.*"

(D, 43.)—"The customs upon merchandise exported and imported are the ancient inheritance of the crown. Both magna custuma and parva custuma and prisage; other customs were repealed by act of parliament."—(Id., D, 43; D, 44; D, 45; D, 46.)

The king, by his prerogative, was entitled to have aids pur faire son fitz chivaler, or son eigne fil marier.—(Id., D, 40.)

And anciently a fine was paid to have right and justice.—(Mad., 293; Id., D, 51.) So there was an ancient revenue to the crown to have a fine for a grant of liberties.—(D, 53; Mad., 272, 588.)

Statute 9, Hen. 3, *Magna Carta*, c. 10, A. D. 1224.—(1 Tomlin's Stat., p. 7.) "No man shall be distrained to do more service for a knight's fee nor for any other freehold than therefor is due."

Statute 18 Edw. 1., cap. 1, A. D. 1289, (p. 235.) *Title.* "Purchasers shall hold of the chief lord, and not of the feoffor." * * * "From henceforth it shall be lawful to every freeman to sell at his own pleasure his lands or tenements or part thereof: so, nevertheless, that the feoffee shall hold the same lands or tenements of the same chief lord of the fee and by the same services and customs as his feoffor held them before."

Cap. 2. "And if he sell any part of such his lands or tenements to any, the feofee shall hold that immediately of the chief lord and shall be forthwith *charged with so much service as pertaineth or ought to pertain to said chief lord for such part according to the quantity of the land or tenements so sold.*"

This is an early act taxing land into whose ever hands it comes, uniformly.

Statute 25, Edw. 1, cap. 5, A. D. 1297. Aids, tasks, and prises by this statute appear to be public revenues for the support of wars and state.

Cap. 6. The king will take none but by the consent of the realm and for the common profit thereof, "saving the ancient aids and prises due and accustomed. These latter revenues were "renders of duty."

Cap. 7. Releases an excessive tax—stigmatized as a *male toll.*—(See also 34 Edw. 1, St. 4, c. 3.)

34 Edw. 1, St. 4, cap. 1, A. D. 1306, (p. 301.) Entitled "*De Tallagio non Concedendo.*" "No talliage or aid shall be imposed or levied by us or our heirs in our realm without the assent," etc. This is quoted to show the derivation of the word impost. Lord Coke says that the word tallagium was from the French tallier; to cut out: which is synonymous with excise, and as both were imposed both are included in the word impost.

Statute 17 Edw. 2, St. 3, (A. D. 1323.) "Modus faciendi homagium et fidelitatem." This statute required the freeman, when he should do homage, to swear to his lord in chief—"I become your man * * , and shall bear you faith for the tenements that I hold of you saving the faith that I owe unto our lord the king." But he could hold other lands of other lords and his oath of homage to them saved the faith he owed to the king and to his other lords. In all cases "when he shall do fealty to his lord" he added an oath lawfully to do the customs and services which he ought to do, *for the tenements.*

14 Edw. 3, St. 1, c. 20, A. D. 1340, (p. 503.) To raise a revenue for war imposes an uniform tax on the produce of the lands of one-ninth and on all the goods in cities and boroughs. Merchants and persons dwelling in forests and wastes being taxed one-fifteenth.

14 Edw. 3, St. 2, (p. 507,) assures us that not only was this special aid a public revenue but all the revenues

of the Crown from the realm of England were to be spent for the safeguard of the said realm of England.

15 Edw. 3, St. 2, (A. D. 1341,) p. 525, levies of wool uniformly one-ninth by weight.

25 Edw. 3, St. 5, Cap. 11, (A. D. 1352,) p. 585. "Also it is accorded and assented that reasonable aid to make the king's eldest son knight and to marry his eldest daughter shall be demanded and levied after the form of the statute thereof made, and not in other manner; that is to say, of every knight's fee holden of the king without mean twenty shillings and no more, and of every twenty pounds of land holden of the king without mean in socage twenty shillings and no more."

If before this statute there has been any doubt as to the rule by which uniformity was to be fixed it is dispelled. The tax on land is uniform, according to the value of the land; and this, as the basis of uniformity, continued, as we shall see, to the last statute we shall examine.

45 Edw. 3, Cap. 11, A. D. 1371, (p. 719,) nullifies impositions by royal authority, and fixes the English constitution.

5 Ric. 2, St. 2, c. 3. (2 Tomlin's St., 57.)

12 Ric. 2, c. 12. "Also, in respect to the levying of the expenses of the knights coming to the parliaments for the commons of the counties, it is accorded and assented that the said levy be made as it hath been used before this time, adding thereto that if any lord or other man, spiritual or temporal, hath purchased any lands or tenements or other possessions that were wont to be contributory to such expenses before the time of the said purchase, that the said lands, tenements, and possessions, and the tenants of the same, shall be contributory to the said expenses as the said lands, tenements, and possessions were wont to do before the time of the same purchase."

Again we find this land tax attached to the land. The land was wont to pay, and it shall still pay, by the same rule of uniformity, without any reference to who is its owner; yet it appears that, in fact, "the tenants are contributory," and may be distrained to pay.

5 Henry 4, c. 11, (A. D. 1403,) p. 260. The lands of aliens must pay the tithes to the church, though seized into the king's hands.

9 Hen. 4, c. 6, (A. D. 1407,) p. 289. "All foreigners having *lands*, *tenements*, beasts, goods, or chattels within

any towns at the day of the grant of any tenth, fifteenth, or other tax, * * shall be contributory with the inhabitants of such towns."

The impost is one-tenth or fifteenth upon the value of the lands or goods, but the owner is thus indirectly reached and made contributory.

From this time statutes levying land taxes are more numerous, but, as they are not found in most editions of the statutes, I will refer only to those of the more prominent nature to fix the principles under which all were levied.

Statute, 43 Eliz., c. 2, A. D. 1601; (4 Raithby, Stat., 547; 7 Pick. Stat., 30.) Entitled "An act for the relief of the poor," was still in force as late as 1800, and formed the basis of many subsequent statutes for land taxes for particular purposes. § 1. It provides for raising the needed material "by taxation of every inhabitant, parson, vicar, and other, and every occupier of lands, houses, tithes, etc;" and (§ 4) for collection of the tax by distress of goods, and in default, by imprisonment of the body; (§ 6) for an appeal to the sessions by persons dissatisfied with the assessment. § 8. The power is conferred on the authorities of towns and cities. §§ 12, 14. The tax is to be ratably assessed within each parish and upon the parishes, etc.—(See whole act as to details.)

One feature in section 14 is of marked significance. The treasurers were to be elected of those "which were sessed and taxed at five-pounds lands, or ten-pounds goods at the least, at the tax of subsidy next before the time of said election to be made;" that is, the yearly value of the lands, as assessed, was 5*l*. And it makes clear the proposition that the universal rule of taxation of property in 1601 was by valuation, and the gauge of uniformity was value, and no other method was thought of, unless for some special levy like that of "hearth-money."—(13 and 14 Car. 2, c. 10; 8 Pick. Stat., 72.) Attention is called to §§ 1, 6, 7, 8, 9, 16, 17, 18, 21, 22, in which this tax on land is denominated a duty or charge, the latter word being occasionally exchanged for the word impost.

2 W. and M., c. 8; (9 Pick. Stat., 100.) A statute for paving and cleansing streets, etc., provides for the raising "*from the inhabitants*" moneys necessary for the purposes of cleansing the streets according to the usages of the city, "and *all new messuages*, etc., shall be likewise rated

taxed and assessed, and shall pay *proportionable with others.*"—(§ 9.) By §§ 10, 12, 13, the inhabitants may make a pound rate, not to exceed "the rate of four pence in the pound, of the yearly value of any lands, houses, tenements, and hereditaments so assessed, nor the rate of eight pence for every twenty pounds in personal estate."

In this act the rule of uniformity is, in some cases, found by the frontage; but whatever burden is laid upon the land is required of the owner, and, whether much or little, is exacted of him by distress of goods, or imprisonment of body; and this imprisonment is because the payment is his duty on account of his ownership or occupancy. It is a tax of persons in respect of their property by means of an impost, charge, or rate laid upon the property.

In passing it is to be noted that the word duty is also used as synonymous with excise in a vast number of statutes. Two examples are sufficient: 2 W. & M., c. 10, (9 Pick. Stat., 115;) and 2 W. & M., c. 3, the latter entitled "An act for doubling the duty of excise upon beer, etc."

Statute 3 and 4 W. & M., c. 12, § 13, (9 Pick. St., 151,) provides for raising money for materials for improvement of highways, by an equal *rate* upon the inhabitants in the same method as provided in St. 43 Eliz., c. 2, cited ante as to poor rates. But read especially §§ 17, 18. Read also (9 Pick. St., 373) 6 and 7 W. & M., c. 18, preamble and § 14, as to the alternative use of the words;—impositions,—rates,—and duties.

One more statute will suffice for our present quotations. 4 W. and M., c. 1, A D. 1692. "An act for granting to their majesties an aid of four shillings in the pound for one year for carrying on a vigorous war against France." (We need to quote no more, because we have learned by Tomlin's Authority that this statute formed the basis and principle of the land tax for more than a century, viz, to 1798.) The sections of this statute marked for examination are numbered 1, 2, 3, 4, 5, 6, (8, to ascertain the yearly value of lands, etc.); (9, rates accordingly); (10, "execution, that all estates herein charged may equally pay the rates and assessments"); 13, (the money comes indirectly from the owner); 29, (when the proprietor can-

not be found, still the money shall be made of his property, by sale of the land if necessary.)

§§23 and 2. We reserve these sections to the last for the purpose of speaking more at large of the evils they were intended to remedy. "Of every person, spiritual and temporal, of what estate or degree soever," the rates and assessments were to be received. All were to be taxed in respect of their property. All to pay in proportion to their ability; and no locality or individual was to be exempt, any law, statute, custom, or prescription to the contrary notwithstanding. From the year 1224 London and the Cinque Ports had been free from burdens which others of the nation had borne.—(9 Hen. 3, c. 9; 1 Hen. 8, c. 5, §6.) And special privileges had existed by Ancient Demesne, (9 Hen. 3, c. 37; 9 Hen. 4, c. 5,) and by the authorities found in Comyn's Digest and other references made in the earlier part of this argument, it is apparent that a large proportion of those most able had escaped the weight of the burdens the nation had borne. This statute, passed in 1692, in a time of reform, was a fit supplement to the revolution of 1688, and the statute 2 W. and M., c. 2, (9 Pick. St., 60,) which forms the basis and inspiration of our own declaration of independence and constitution of government to secure liberty; this statute of uniform burden according to ability, establishes justice and follows aptly on that securing liberty.

Nor was this a new idea, for the court will observe that every former statute extending universal burden was coupled with or came immediately after re-affirmance of liberty in the confirmation of Magna Charta. Both were too apt to be violated by an aristocratic government; established upon the idea that all were born unequal; and that kings were rulers by divine right and by inheritance. For examples see St. 1, Ric. 3, c. 2; (2 Tomlin's Stat., 693,) which recognizes an inequality so great as to reduce many worshipful men to great necessity, compelling them to break up their households and live in great penury and wretchedness, their debts unpaid, etc. The case of impositions, 2 Cobbett State Trials, 371. More concisely examined in its constitutional bearing by Hallam in his Constitutional History of England. The case of Sir D. Fowlis in 1633, 3 Cobbett's St. Trials, 586, and Rex v. John Hampden, the case of ship-money.—Id., 844.

This rule of uniformity, its origin and the general prin-

ciples of taxation on account of property seem to have come down from Saxon times and to have formed the general and well understood basis of taxation in England. This appears clearly in 1 *Maddox History of the Exchequer*, 208, 272, 569–786, in which attention is directed to *aids.*—569 et seq. 576; 606 (origin of subsidy); 612 (Fines or Commutations); 619 (Scutage or Escuage); 685 (Danegeld; the words, *–firma, superhidagio,—in wasto*, fixing the character of the levy: see especially p. 693); 694 (Tallage); 764 (Customs.) Please read also CALLIS on Sewers, (top pages,) 152, 153, 162 et seq., and 183.)

That this system was well known and understood by Franklin and many others of "the people of the United States," who had lived in England, is very evident. We have no declarations of their construction, and can have none. The speeches made in the Convention or Committee that drafted the instrument are of no value to ascertain their intent, because not one Elector in three in those days of no newspapers knew anything beyond the views of the delegate from his vicinity who would remember his own opinions and give little circulation to those of others. To the words used we must look, coupled with the history of the land from whence most of our institutions gained their rise, and especially in the conclusions of the wisdom of that people in providing guaranties to secure liberty and establish justice, we must seek the true construction.

The case of Hylton vs. The United States (2 Dallas) makes one thing clear, and but one, and that is that the judges were endeavoring to theorize and theorize only. Not a single authority is cited and no reference to the rules of common law can be found.

It seems to me that, upon page 173, Mr. Justice Chase simply misapprehended the words and the object of their use. It was because all possible taxes were included in the words direct taxes, duties, imposts, and excises that these words were used. These were universal words comprehending every phase in which the sovereign could take from the subject to support the state; and these general and generic words were used precisely as they had been in the law,—interchangeably,—and all were used that no wild or vagrant power might be claimed by quibbles and specious arguments upon some new name

or on some old one; like that of Custom, which it might be argued had never been within the denomination of tax or duty. That this Justice was only guessing is evident from what he says, on page 174, as to the distinction between direct and indirect taxes, on which he had no definite ideas but only a general belief.

Yet the principle was right that no tax can be direct but one that can be laid in proportion to the census; and it would be strange indeed, if, as to land taxes, the rule of uniformity and ability to pay had been overturned without the least apparent cause and an experiment substituted. A rule which had its origin in Saxon times; had been adopted successively by Danes and Normans; corresponded with the equality of feudal tenures; had been preserved or revived in the charters of common law liberty and justice; had been perfected by the wisdom of centuries; had been improved and made universal as part of Britain's new and free Constitution after the revolution, forming the unchanged basis of taxation for more than an hundred years, and still the unchanged principle; a taxation in which we had vainly sought to be represented and to participate. It would be strange indeed had all this been overthrown for an experiment; and we have no evidence that the people intended to change it any more than to change the established principles of jury trial and substitute theories. All the reasoning that defines a jury under our Constitution also defines uniform taxation.

Mr. Justice Patterson, on page 176, shows cleary that he was only guessing; confesses that he had no precise ideas, and conjectures that "perhaps" there may be indirect taxes not included within the divisions with whose names he is familiar, and these mythical existences he puts down as a third class. Had the Congress imposed a tax of the tenth sheep or the tenth lamb, and the tenth of all salaries, the court would probably have looked into a book to see what a tax was, if they had any books to look into, and then we should have had more than mere guesses. Had the books been studied they would have seen that the rule of uniformity forbade taxation by the acre, as suggested on page 177, except in the single instance of the sewers, where lands liable to be overflowed were benefited by protection in proportion to their area, and even then the area was not conclusive, but the bene-

fit was to be considered also. I except the scavenger rates by the frontage, as they come rather under the police regulation.

Mr. Justice Patterson comes very near the rule, without discovering it, however, on page 178. "Numbers "do not afford a just estimate or rule of wealth. It is "indeed a very uncertain and incompetent sign of opu- "lence." He thus affirms that the people ought to have required that burdens should be proportioned to ability, without understanding that that was precisely what they did.

At pages 178 and 179 he says that no common principle can be deduced from the practice of the states. I think that even at that time, he was mistaken. It is certain that from the year 1800 to the present the common principle of taxation of lands by valuation has pervaded the system, reaching substantially the same result as the common law; and, more than that, the tax has been required of the owner, in the same way, by distress of goods, imprisonment of the body, and extent upon the lands and sale thereof. And the operation of this rule has been so complete that, without any provision of any state constitution to that effect, the sales of lands for taxes have uniformly been held void if they were not taxed in the name of the right owner, or in no name, under the rule of the common law, (stated ante,) "*for some person ought to be assessed for such lands.*" I believe that this rule has not been relaxed in any state except by special statute for that purpose.

This common law system has attained all that this justice desired, when he said (p. 179), "Let us, however, "hope that a system of land (or property) taxation may "be so corrected and matured by practice as to become "easy and equal in its operation and productive and ben- "eficial in its effects."

It is singular to see how near this judge came to being right (p. 180): "Indirect taxes are circuitous modes of reaching the revenue of individuals." Nothing is more true. Chicago has every year indirectly put her hand into the pocket of George Smith, the Scotch banker, in London, and U. S. Grant, in the White House, by laying taxes on their lands—lands that have never had a turf turned by man since the Indians used them for their camping grounds. Ownerships have changed, titles have

been transmitted, and estates carved out of these titles. Titles would be sold, divested, and transferred by the State of Illinois sufficient to obtain her revenues, if not redeemed by payments of the owner; but, during all, the land is inert, unchanged, and unchangeable by any such influence. The ownership only is affected, and men all over the world are indirectly reached and made poorer—made contributory to the expenses of the government of the city and state.

What is said about a tax on expense is a simple absurdity. Tax a spendthrift on a fortune spent! Tax a man on what he has lost! Get sugar from a maple in June! The tax is laid on the property a man has and not on that he has not.

One book is cited in all this case, *Smith's Wealth of Nations*,,and that quotation shows the author of this absurdity, who bases it upon a greater one, whereby he would exempt the miser from the support of the state, no matter how great his ability or possessions nor how much it might cost the state to preserve his property and his ownership, while the liberal man, the man of large family, of large expenses, burdens, and obligations was for that very cause to have another load laid upon him. Justice Iredell says that a tax on land can be laid by a rule of apportionment like a poll tax. There were large land owners at that day; proportionally large as compared with others, and citation of present instances only differs in degree, not in principle. How are you to apportion a tax by the census where landed estates grade down from William B. Astor's forty millions to the colored owner of the swamp lot on the edge of the Potomac or the laborer whose shanty and prairie acre are scarcely worth five dollars. If practical application is a rule of any value, the framers of the Constitution did not intend to change the principles of the common law, for land cannot be taxed by apportionment without shocking all ideas of decency, to say nothing of justice.

Some early Congresses passed laws upon this basis, and that proves that they followed the Supreme Court and fell into the same blunder, and that is all.

To show how little value can be placed on the acts of legislatures as affording contemporaneous construction, I will cite Illinois as the most recent instance.

A Constitutional Convention of considerable ability

spent four or five months in the early part of 1870 drafting a Constitution. For careful study and comprehension of many of the principles expressed it was a remarkable body. The people enacted the draft and it took effect August 8, 1870. The first legislature chosen with a view to carry its provisions into wise and complete effect, contained at least one-third of that Constitutional Convention, and some of the best lawyers of Illinois, including Judge Underwood, J. N. Jewett, Mr. Nelson, etc. Yet of the acts they passed in a four months session, I believe two-thirds were vetoed and returned for unconstitutionality, and a special session had to be called to consider, among other things, seventeen bills that were vetoed after the close of the session, and some of those that received the Governor's signature are void.

Again: Writers of the time could be of little value in the construction; this is to give the garrulous theorist an advantage over the deep and silent Franklin, (whose handiwork is evident in this financial arrangement,) and over others whose brains are more efficient than their tongues. If all had expressed their sentiments we might examine the opinions of two millions of people seriatim, and guess at the united intention; yet they all have spoken, and have made a law, and it is logical that whatever the talk may have been before or afterwards we should seek their intentions in the instrument, which they have used as their embodiment, interpreted as a law by the precedents and rules of law. And the very first rule of construction, if the words are at all ambiguous, is to learn what was the common law before, and what evils it was designed to remedy. (I say this because I had at least an hundred memorandums from contemporaneous writers indicating their ideas as I have given them, but this was before I understood the common law, and now that they are burned I do not deem them worth the time necessary to restore them.)

There is one principle that I think is sometimes overlooked in construing constitutions, and that is that the intention of the law makers is to govern, and inasmuch as this nation is fundamentally democratic, and constitutions are made by the democratic mass of the people, who are incapable of fine ~~show~~ and abstruse theories, such laws are to be construed according to their plain, obvious, common sense meaning. The great power of

the people; the great power of the common law in all the past; the great strength of our institutions based on their authority only, is in their sturdy, honest, common sense.

Taxation as a science fills a large division in the science of government. Mere theory is not worth a copper; practical efficient executive ability is necessary,—financial ability; results must be obtained. And this is precisely the occupation of all the people, making a revenue, accomplishing results;—food, clothing, shelter, necessaries, and luxuries they must have, and to the inexperienced and mere theorist this problem is a difficult one and for a time is filled with impossibilities, but the rule that curbs them is not a paper constitution to be warped by construction or construed away; immutable laws of nature bar the paths they must not tread; but the impossibilities are accomplished and the problem solved. In this kind of knowledge lawyers are very deficient; indeed, as a class, they seem to rank with other stipendaries who do so much work for so much pay. Under these circumstances it is not strange that these questions should not have been raised; the argument from that is a weak one at best, but in this case peculiarly so. This argument is an old one; among the many instances of its application was to Galileo, when he said the world moved; the wise men shook their heads, said he never had been much of a man, many other wise men had lived before him, and if the world moved they would have discovered it. All true, but the conclusion. I have tested this thing from salt water to the Missouri. In scores of cases asking the distinction between direct and indirect taxes, and receiving substantially the same reply as from a farmer of Ohio the other day: "A direct tax is a poll tax, hits a man "straight where he is; an indirect tax is a land tax or a "cattle tax, reaches him anywhere and makes him pay "it to keep his property from being sold."

In conclusion:—Discrepancies and verbal differences between this brief and that of Mason vs. Rollins, written over eighteen months since, will be discovered, yet the differences are not deep and the principles are fully affirmed.—(See brief in that case, section 118, and specially page 509.) It is quite natural that in two years of study something could be improved, and I have been compelled to long and patient study and careful thought to

reach correct conclusions. The law department of my city and county had carried so high a hand as to refuse even inspection of the Warrants of Collection, and denied the power of the courts to compel them to produce evidence, and the courts of original jurisdiction sustained them. Clients seemed to multiply at this juncture. It was evident there could be no middle ground; their principles must prevail or be crushed.

Every oppression by color of justice or right is extortion.—(Co. Litt., 368, *b.*) And this was a great offence by the common law.—(Comyn's Digest, "*Extortion*," (A, 1.)

If this tax is not due it ought not to be taken. Capital is capital; by a little start in life a man can often succeed, but take away his capital and his business is destroyed; he has no resource but to labor with his hands, and he should be protected from such unlawful acts of violence. He ought to have some remedy, some protection. The law is that he shall not be *deprived* of *life*, *liberty*, or property but by *due* course of law, and it is as old as Bracton that "it would be surperfluous to make laws unless those laws were made to be enforced." Is this law a mere superfluity?

Edward Roby,
Counsel.

NOTE.—The following is quoted not as belonging to this argument, but to the general cases, and because it ought to be read, for it were a shame if a high degree of civilization were not consistent with the practice of as high a degree of justice and of liberty as in theory existed in the dark ages. In *Horne's Mirror of the Justices*, written in the time of Edward I., read: (page 4.) "And, although the king ought not to have any peer in the land, nevertheless because that the king, of his own wrong, if he offend against any of his people, nor none of his commissaries, can be judge and party, it was behoveful by the law that he should have companions to hear and determine of all writs and plaints, of all wrongs, as well of the king as of the queen and her children, and of those especially where one could not have otherwise common right." Page 8: "It was ordained that everyone have a

remedial writ from the king's chancery, according to his plaint, without difficulty."

Page 10: "It was ordained that the king's courts should be open to all plaints, by which they had original writs, without delay, as well against the king or the queen as against any other of the people."

Page 20: "Into perjury against the king fall those ministers who deny to plaintiffs original writs possessory, attaints or of formedon, or otherwise do delay their rights, and those who wrongfully do delay or disturb rightful judgments, and those who wrongfully favor wrongful judgments."

Page 51: "The sheriffs, by ancient ordinances, hold several meetings twice in the year in every hundred when all the freeholders within the hundred are bound to appear for the service of their fees. * * Such appearances are called sheriffs' turns, where it belongeth to the sheriff to inquire of all personal offences, and of all their circumstances, done within those hundreds, and of all wrongs done by the king and queen's officers, and of wrongs done to the king and to the common people, according to the points aforesaid in the division of offences."

Page 52: "Views of the frank pledges." "It was also ordained that every hundred do make a common meeting once in the year * * to inquire of the points aforesaid and of the articles following. * * The articles are these:

By the oaths you have taken you shall declare * *

Of all wrongs done by the king's officers and others to the common people.

* * * * * * *

Of every wrongful detinue of the body of a man or other distress.

* * * * * * *

And the said presentments are to be sealed with the seal of the jurors, so that none by fraud do increase or diminish them."

And for every matter there is to be its proper redress. This is the original of charges to grand juries.

Page 62: "Therefore the kings used to go from county to county every seven years to inquire of offences and trespasses, and of wrongs done to themselves and to the

crown and to the common people, and of all wrongs, errors, and negligences of their officers."

Page 177: "Jurisdiction is a power to declare the law." A true definition to-day, for, as Lord Coke says, "*Ex facto jus oritur.*" *Ergo;* a state cannot have jurisdiction of the subject-matter of these suits.

It is believed by many learned men that this book was written by King Edward I. himself. If so the section upon the "abusions of the common law" is of great significance, as he has sometimes been compared with Justinian as the founder and compiler of the system of laws.

Page 225: "It followeth that many ordinances are grounded more upon pleasure than upon law."

Page 236: "It is an abuse that we do not sue for a tortious distress by way of felony, and that one attaint not these robbers at the king's suit."

Page 238: "It is an abuse that justices and their officers, who kill people by false judgment, be not destroyed as other murderers, which King Alfred caused to be done."—(p. 241.) "He hanged Hall because he saved Tristram the sheriff from death; who took to the king's use, from another's goods, against his will, for as much as any such taking from another against his will and robbery hath no difference."

"He hanged Arnold because he saved Boyliffe, who robbed the people by color of distresses, whereof some were by selling distresses, some by extortion of fines, as if betwixt extortion of fines releasing of tortious distresses, and robbery there were difference."—(p. 245.) "In his time every plaintiff might have a commission and a writ to his sheriff, to the lord of the fee, or to certain justices assigned, upon every wrong which was done."

See the antiquity of the common law princeple, "for every wrong a remedy."

Page 262: "And it seems cross to make constitutions not holden."

Page 278; "The statute of distresses made by bailiffs unknown is distinguishable, for in tortious distresses without warrant the judgment of robbery holdeth."

In the pamphlet annexed to this edition of *the Mirror*, compiled Ann. 21, Henry VIII., on *The Diversity of Courts and their Jurisdictions*, read at page 287: "It is to be un-

derstood that the king is the fountain of justice, and to that purpose ordaineth judges, that justice be administered to all his subjects."

I have read this ancient and valuable book through to-night and the above is the cream of the matter relating to this subject. I shall quote farther from it, however, when treating of the trial by jury guarantied by the Constitution, and of the power of the court over evidence, in the argument which I will file in a few days (in No. 391 of present 1870 term, i. e., 213 kegs Tobacco, etc. v. The U. S.) against the power to punish violations of law by a suit *in rem* for forfeiture.

Edward Roby, Counsel.

15-111

SUPREME COURT OF THE UNITED STATES

December Term, A. D. 1871.

THE UNITED STATES

vs.

JACOB SINGER ET AL.

Argument for all the Defendants

EXCEPT JACOB SINGER.

Printed by the CHICAGO LEGAL NEWS Company, 15 North Jefferson St.

Supreme Court of the United States.

DECEMBER TERM, 1871.

THE UNITED STATES,
Plaintiff in Error,

vs.

JACOB SINGER,
JOSEPH R. BICKERDIKE,
ROBERT W. ROBINSON,
C. PEASCH,
JACOB CASPER SCHNEIDER,
AND
WM. HOULSBY,
Defendants in Error.

STATEMENT.

On the 18th day of January, 1869, the defendants, Singer & Bickerdike, who were then engaged in the distillimg business in Chicago, with the other defendants as their sureties, executed and delivered to the proper officers of the Government the following bond (Trans., page 4) :

[Copy.]

UNITED STATES INTERNAL REVENUE.

Distiller's Bond.

[This bond must be executed by every distiller before commencing or continuing business under this act, and on the first day of May, in each succeeding year. (Act July 20, 1868, Sec. 7.)]

11 Know all men by these presents that we, Jacob Singer, res. cor. Asylum place *said* Franklin, and Joseph R. Bickerdike, res. 85 Washington st., as principals; and Robert W. Robinson, res. 315 W. Lake st., Christian Peasch, res. 526 N. La Salle st., Jacob Casper Schneider, res. 207 Indiana st., and William Houlsby, res. 123 W. Randolph st., as sureties, are held and firmly bound unto the United States of America, in the full and just sum of ninety-two thousand dollars, money of the United States, to which payment well and truly to be made we jointly and severally bind ourselves, our heirs, executors and administrators firmly by these presents, sealed with our seals, and dated this 18th day of January, A. D. 1869.

The condition of the foregoing obligation is such, that whereas the said Jacob Singer and Joseph R. Bickerdike

12 now, or intend, on and after the 18th day of January, 1869, to be engaged in the business of a distiller within the first collection district of the State of Illinois, to wit, at North Branch Chicago River, near North avenue, situate in the city of Chicago, county of Cook, and State aforesaid:

Now, therefore, if the said Jacob Singer and Joseph R. Bickerdike, shall in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions, and shall not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distillery apparatus to be encumbered by mortgage, judgment, or other lien during the time in which he shall carry on said business, then this obligation shall be void; otherwise it shall remain in full force.

JACOB CASPER SCHNEIDER. [SEAL.]
WILLIAM HOULSBY. [SEAL.]
JACOB SINGER. [SEAL.]
JOSEPH R. BICKERDIKE. [SEAL.]
ROBERT W. ROBINSON. [SEAL.]
CHRISTIAN PEASCH. [SEAL.]

Upon said bond this suit was brought.

The breaches alleged in the declaration are: 1st. That Singer & Bickerdike, during the month of November, 1868, manufactured spirits at their distillery, and made return for that month to the assessor of the spirits so manufactured, and the quantity of spirits so returned was less than 80 per cent. of the producing capacity of said distillery, as estimated under the provisions of the internal revenue law, and thereupon said assessor, on the 10th day of February, 1869, made an assessment against Singer & Bickerdike for the deficiency in said return, which amounted to the sum of $26,089.06, which they have refused to pay. 2d. By amendment, plaintiff set up as an additional breach that the said Singer & Bickerdike failed to comply with the provisions of law in relation to the duties and business of distillers, in this, that one C. W. Davis, an internal revenue storekeeper appointed by the Secretary of the Treasury of the United States, and assigned by the Commissioner of Internal Revenue to the distillery warehouse, of which said Singer & Bickerdike are proprietors, established by law, in connection with said distillery of said Singer & Bickerdike, at a salary of five dollars per day, had charge as such storekeeper of said warehouse from the fourth to the twenty-fifth days inclusive of March, A. D. 1869, and became thereby entitled to the sum of one hundred and ten dollars for said services, which said last-named sum has been paid by the plaintiffs to said Davis for said services, and it thereupon became the duty of said Singer & Bickerdike, as such distillers and proprietors of said warehouse, to reimburse to the said plaintiffs said sum of one hundred and ten dollars.

Yet the said Singer & Bickerdike, though often requested, have never paid said sum or any part thereof to said plaintiffs.

To the first count the defendants filed their third amended plea.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

December Term, A. D. 1870.

THE UNITED STATES
vs.
JACOB SINGER, JOSEPH R. BICKERDIKE, et al.

And the said defendants, for further plea in this behalf say that the said Singer & Bickerdike made return to the assessor of the first collection district of the State of
23 Illinois, of all highwines and spirits produced at their said distillery during the month of November, 1868, as by law they were required to do; and that an assessment was made by the said assessor against the said Singer & Bickerdike for the full amount of the tax on the highwines and spirits so produced and returned, and that the amount so assessed has been fully paid. And the said defendants further aver that no other highwines or spirits were produced at said distillery during the month of November, 1868, than what were returned as aforesaid, and this the defendants are ready to verify.

OLNEY, *for Defendants.*

To the second count of the declaration defendants demurred.

To the plea above set forth the plaintiff demurred.

The court below sustained the demurrer to the second

count of the declaration, and overruled the demurrer to the above plea.

To reverse these rulings the plaintiff brings the case to this court.

ARGUMENT.

The demurrer admits that Singer & Bickerdike have paid the tax upon every gallon and fraction of a gallon of spirits manufactured by them, and the question presented to this court is whether under the law they can be compelled to pay a tax upon *what they have not manufactured, upon what in fact never had an existence.*

I.

The object of the extraordinary provisions contained in this law was to enable the officers of the government to assess and collect the tax upon what should be actually produced, and *upon that alone.*

It will hardly be believed by this court that Congress intended, in the enactment of this law, to enable the government to collect a tax upon property not existing within its jurisdiction, or to compel the citizen to pay a tax either upon what he has not produced or what he cannot produce. If this court could be induced to believe that Congress so intended, its moral sense would be shocked when it sees that by other provisions of this law, the officers of the government are empowered to seize and sell the property of the citizen

for the purpose of collecting this tax upon what he has not, and never had; and that, too, without legal process and without a chance to be heard in a court of justice. It is, at least, certain that such construction will not be given to this law unless it is susceptible of no other.

The act of July 20, 1868, is entitled, "An act imposing "taxes on distilled spirits and tobacco, and for other purposes."

The most careful inspection of the first nineteen and the last eighty-nine sections of this law will show that in enacting its different provisions, Congress intended to provide the means for determining the amount of spirits actually manufactured by the distiller, and to enforce the collection of the tax thereon. From them no intimation can be gathered that it, by any possibility, intended to provide for the collection of tax upon what was not produced.

The 20th section of this law reads as follows: "And be "it further enacted, That on the receipt of the distiller's first "return in each month, the assessor shall inquire and deter- "mine whether said distiller has accounted in his returns for "the preceding month for all the spirits produced by him; and "to determine the quantity of spirits thus to be accounted for, "the whole quantity of materials used for the production of "spirits shall be ascertained; and forty-five gallons of mash "or beer brewed or fermented from grain shall represent not "less than one bushel of grain, and seven gallons of mash or "beer brewed or fermented from molasses shall represent not "less than one gallon of molasses. In case the return of "the distiller shall have been less than the quantity thus

"ascertained, the distiller or other person liable shall be "assessed for such deficiency at the rate of fifty cents for "every proof gallon, together with the special tax of four "dollars for every cask of forty proof gallons, and the collec- "tor shall proceed to collect the same as in cases of other "assessments for deficiencies ; but in no case shall the quan- "tity of spirits returned by the distiller, together with the "quantity so assessed, be for a less quantity of spirits than "eighty per centum of the producing capacity of the dis- "tillery as estimated under the provisions of this act."

Under this section the assessor levied the pretended tax for the collection of which this suit was brought.

The Honorable Thomas Drummond, whose great learning and large experience in this class of cases entitles his opinion to great weight, in deciding the case of the United States v. Singer & Bickerdike, carefully considered the meaning of this section of the law. His opinion upon the point under discussion is as follows :

"The first question turns upon the validity of the plea, and consequently upon the true construction of the 20th section of the Act of Congress of July 20th, 1868. That section declares that the assessor, in order to determine whether all the spirits produced in a distillery have been returned, shall ascertain the whole quantity of materials used for the production—"and forty-five gallons of "mash or beer brewed "or fermented from grain, shall represent not less than one "bushel of grain, and seven gallons of mash or beer brewed "or fermented from molasses shall represent not less than one gallon of molasses." If the return is less than the quan-

tity thus ascertained, the distiller or other person shall be assessed for the deficiency, * * * * * "and the collector shall proceed to collect the same as in "cases of other assessments for deficiencies." Now it will be observed that the language of the section as referred to above, seems to proceed on the basis that it has given a mode of ascertaining the quantity of spirits produced by declaring that forty-five gallons of mash shall represent one bushel of grain, under the implication that when the number of bushels of grain is known the quantity of spirits produced is exactly ascertained, an implication contrary to the fact, as is well understood by all practical distillers. If the section had arbitrarily declared how much spirits one bushel of grain should represent, then this part of the difficulty would be removed. The section concludes with this provision: "But in no case shall the quantity of spirits returned by the distiller, together with the quantity so assessed, be for a less quantity of spirits than eighty per centum of the producing capacity of the distillery as estimated under the provisions of this act.

"This 20th section would appear to have been framed for the purpose of prescribing a method of ascertaining the product of the distillery; or to impose a tax on its capacity as such; or to unite both, and thus if the distiller should in fact produce eighty per cent., then it was to be a tax on the product, and if less, on the capacity.

"In order to determine which of these is the true meaning of this section, the facts of this case should not be forgotten. It has been conceded in the argument by the district attorney that, so far as is known and believed by the officers of the government, the distillers in this case returned all the

spirits they manufactured in the month of November, 1868. and that the assessment in controversy was made upon a quantity of spirits that never existed.

"In examining the act of July 20, 1868, the inquiry naturally arises — what was its object as to distilled spirits? It is entitled "An act imposing taxes on distilled spirits and tobacco and for other purposes." The first section declares what tax shall be levied and collected on distilled spirits, and the following sections contain various provisions for ascertaining and securing the payment of the tax. The tenth section designates in what manner the true producing capacity of each distillery shall be determined, and how errors in such estimate shall be corrected. The thirteenth section imposes a daily tax upon the distiller in proportion to the capacity of his distillery for mashing and fermenting grain, etc.

"The 14th, 15th, 16th, 17th, 18th and 19th sections contain various and minute directions as to the construction of buildings and machinery and the mode of manufacture, in addition to those previously prescribed, and the main object of which appears to be to guard against dishonest practices by the distiller. Besides all this, the distiller or principal manager is to make his return three times a month under oath, stating the quantity and kind of materials used for the production of spirits each day, and the number of wine gallons and proof gallons of spirits produced, and he is bound to include all, because he must asseverate there was no more used or produced. After this follows the 20th section, the substance of which has been already stated, and numerous others, all of the same general purport up to the 59th, which imposes an annual special tax upon distillers in proportion,

not to the capacity, but to the actual product of the distillery.

"If it were the purpose of the law to assess also a tax upon the capacity alone of a distillery as representing its actual product, and in this way tax the supposed product itself, and if it be true that such a tax is something else than an assessment upon the distillery and machinery, merely because they possess a certain property or quality, then it is singular that such multifarious and complicated provisions were considered necessary to ascertain and collect the amount. If the producing capacity of a distillery is known — then it is a simple thing to say, it shall pay fifty cents as a tax on every gallon it is capable of producing; and the complex and expensive arrangements and safe-guards to prevent fraud thrown around the manufacture of distilled spirits, could be dispensed with at once. The object of so much legislation must have been to ascertain the product and thus compel the payment of a tax on the whole of the article manufactured. Such a tax may be said to be just as having something on which to operate; whereas a tax on the producing capacity of a distillery, if it be not a tax on the distillery itself, is often on a mere imaginary thing. It is like the attempt to tax an income where there is none. If we examine the language of the 20th section in connection with that part of the 19th section, already referred to, this view of the law will be strengthened. The distiller must return the whole of the spirits manufactured under oath, but in no case shall the quantity returned be less than eighty per cent. of the producing capacity of the distillery, so that, literally, if the distillery has produced less than eighty per cent., which is alleged to be the fact in this case, then the distiller is

required to make a false return and swear to it. This certainly can not be the meaning of this section, because a previous part of the section, after assuming — contrary to the fact — that a test of quantity had been given, directs an assessment to be made if the quantity returned shall be less than that thus ascertained.

"The only construction that can be given to this section, consistent with reason and the general scope and purpose of the law, in my opinion, is — if the return is not equal to eighty per cent. of the producing capacity of the distillery, the assessor shall assume that it ought to have been, and the distiller shall then be assessed on that basis, as a method of discovering the actual product. It could not have been intended the distiller should return what he had not produced, nor that he should pay a tax on nothing. My conclusion is that the object of this section of the law is accomplished when the distiller has paid the proper tax on all the spirits he has manufactured. The letter of the section seems to be framed on a certain theory, but it is not possible, even for an act of Congress, to make a bushel of grain produce more spirits than nature has supplied and science and skill can extract. One bushel of grain is not always precisely like another, nor is distilling always carried on under precisely the same circumstances, nor with precisely similar machinery and appliances of manufacture. And if a distillery has run part of a month, and is accidentally destroyed by fire or otherwise, is the letter of the statute still to be followed and an assessment of eighty per cent. made and enforced for the whole month when the product may have become impossible? And if not, why not? Such is a case in actual controversy in this Court.

"Admitting then it may have the effect of compelling the distiller to establish, when he has not returned eighty per cent. of the producing capacity of his distillery did not produce it, I must hold when that is done, it is an answer to the claim set up under this section for an alleged deficiency—the fact then being that a deficiency does not exist. * * * In conclusion, on this part of the case, it must be said once more that if the position of the government is correct, that the law intended to levy and collect a tax of fifty cents on every gallon of distilled spirits which a distiller was capable of producing without regard to the fact that it ever was actually manufactured, it is to be regretted the meaning was not more clearly expressed. It was only to determine the producing capacity of the distillery, and the beginning and end of its operations, and the thing was done. Instead of which we have a series of restrictions and impositions, and a system of inquisition and espionage upon distilling—admitted by the act to be a lawful occupation—which if extended to all other kinds of business would make the collection of taxes odious and oppressive, and indeed, well nigh intolerable." 3 Chicago Legal News, 81.

The reasoning of the learned Judge upon the construction of this section seems conclusive. This decision is certainly in accordance with justice and right, and in harmony with that principle of the law which requires that statutes, if possible, be so construed as to be equal and fair in their operation and unoppressive to the citizens. Indeed it is a general rule that statutes which abridge the liberty of the citizen, or are oppressive in their operation, must be strictly construed.

Shall should be construed to mean *may*, and section 20 must, as it seems to me, be regarded as directory. This section being directory, the assessor ought not to, and cannot, legally follow the rule it lays down, unless he believes it will enable him to ascertain the amount produced. By section 20 the assessor is directed to "inquire and determine "whether the distiller has accounted in his returns for the "preceding month for all the spirits produced by him." If, as is understood in this case, the distiller did return "all the spirits produced by him, and the assessor so believed, it would seem to any just man that the duty of the assessor was in this respect ended, and that he was authorized by the law to go no further. To then go on and levy a tax upon what had not been produced, was repugnant to common sense and common honesty.

Again, every charge upon the subject must be imposed by clear and unambiguous terms, and when any ambiguity is found the statute must be construed in favor of the citizen. It was conceded by the district attorney upon the argument below that there was an hiatus between the different parts of this section — between "five gallons of beer" and "spirits." Such seems clearly to be the case, and if so, the court cannot supply it. It is very likely that had it not been for such omission the intention of the legislature would have been plainly different from the claim of the plaintiff, and would have left no doubt as to its intention to provide the means of ascertaining the exact amount of spirits produced and to tax that and nothing else. The law nowhere states what amount of *proof spirits* shall represent a bushel of grain, and unless we can tell how much proof spirits Congress

intended should represent a bushel of grain, we can only guess at its intention, or at most reach it by inference. It may be argued that proof spirits being defined by the act, proof gallon means a gallon of proof spirits, but in the construction of such a statute as this have we a right to assume this? Should we seek to supply sentences or even words in order to fix a construction upon this statute that must be regarded as oppressive and unjust in the highest degree?

It is not improper, in construing a doubtful statute, to look to the consequences that would follow the construction asked.

If the plaintiff is right in the construction of this section, a distiller might commence business to-day, and before he had manufactured a single gallon of spirits his distillery might be destroyed by fire and he held bound to pay a tax of 80 per cent. upon the full capacity of his distillery for the full month; or from some accident to his machinery, without any fault of his, he might not be able to run one quarter of the month and still be compelled to pay the same tax as though no accident had happened.

It is perhaps not improper to state that the government is now seeking to enforce such claims in the Northern District of Illinois.

II.

If the construction above given to this section is not the true one, then it is void; 1st. Because Congress cannot levy a tax upon nothing; 2d. Because the tax it seeks to levy is not and cannot be uniform; 3d. Because this imposition upon

a deficiency is not a tax, but is a penalty, and cannot be enforced by an action upon the distiller's bond; 4th. Because if Sec. 29 is to be literally construed, it empowers the officers of the law to seize and confiscate the property of the citizen, who has been guilty of no crime or offense known to the law; and, 5th. Because the legislature attempted the exercise of a judicial power in excess of legislative authority.

Before the fire I carefully prepared an argument upon the points here made. By it every paper in my office, my own and every other law library in this city was destroyed, and we are yet without anything like a complete library in this city. I shall therefore be compelled to argue the question here presented upon principle mainly.

1st. Congress cannot levy a tax upon nothing. It is admitted that this tax of $26,089.60 was levied upon nothing; that the fifty-two thousand and odd gallons, upon which the assessor sought to impose it, never had an existence.

A tax is defined by Webster to be a "rate or sum of "money assessed upon the person or property of a citizen "by government for the use of the nation or state."

"Tax is a term of general import, including almost every "species of imposition on persons or property for supplying "the public treasury. as tolls, tribute, subsidy, excise, "impost or customs. But more generally, tax is limited to "the sum laid upon polls, lands, houses, horses, cattle, "professions and occupations."

Bouvier defines a tax as follows: "A contribution imposed "by government upon individuals for the government of the

intended should represent a bushel of grain, we can only guess at its intention, or at most reach it by inference. It may be argued that proof spirits being defined by the act, proof gallon means a gallon of proof spirits, but in the construction of such a statute as this have we a right to assume this? Should we seek to supply sentences or even words in order to fix a construction upon this statute that must be regarded as oppressive and unjust in the highest degree?

It is not improper, in construing a doubtful statute, to look to the consequences that would follow the construction asked.

If the plaintiff is right in the construction of this section, a distiller might commence business to-day, and before he had manufactured a single gallon of spirits his distillery might be destroyed by fire and he held bound to pay a tax of 80 per cent. upon the full capacity of his distillery for the full month; or from some accident to his machinery, without any fault of his, he might not be able to run one quarter of the month and still be compelled to pay the same tax as though no accident had happened.

It is perhaps not improper to state that the government is now seeking to enforce such claims in the Northern District of Illinois.

II.

If the construction above given to this section is not the true one, then it is void; 1st. Because Congress cannot levy a tax upon nothing; 2d. Because the tax it seeks to levy is not and cannot be uniform; 3d. Because this imposition upon

a deficiency is not a tax, but is a penalty, and cannot be enforced by an action upon the distiller's bond; 4th. Because if Sec. 29 is to be literally construed, it empowers the officers of the law to seize and confiscate the property of the citizen, who has been guilty of no crime or offense known to the law; and, 5th. Because the legislature attempted the exercise of a judicial power in excess of legislative authority.

Before the fire I carefully prepared an argument upon the points here made. By it every paper in my office, my own and every other law library in this city was destroyed, and we are yet without anything like a complete library in this city. I shall therefore be compelled to argue the question here presented upon principle mainly.

1st. Congress cannot levy a tax upon nothing. It is admitted that this tax of $26,089.60 was levied upon nothing; that the fifty-two thousand and odd gallons, upon which the assessor sought to impose it, never had an existence.

A tax is defined by Webster to be a "rate or sum of "money assessed upon the person or property of a citizen "by government for the use of the nation or state."

"Tax is a term of general import, including almost every "species of imposition on persons or property for supplying "the public treasury, as tolls, tribute, subsidy, excise, "impost or customs. But more generally, tax is limited to "the sum laid upon polls, lands, houses, horses, cattle, "professions and occupations."

Bouvier defines a tax as follows: "A contribution imposed "by government upon individuals for the government of the

"state. It is distinguished from a subsidy as being certain "and orderly, which is shown in its derivation from Greek "*taxis ordo*, order or arrangement. The eighth section of "article one of the Constitution of the United States pro- "vides that 'Congress shall have power to levy and collect "taxes, duties, imposts, and excises, to pay,' etc. 'But all "duties, imposts and excises shall be uniform throughout the "United States.' In this sense taxes are usually divided "into two great classes, those which are direct and those "which are indirect. Under the former denomination are "included taxes on land as real property, and under the "latter taxes on articles of consumption. 5 Wheaton. See "generally Story on the Constitution, c. 14. 1 Kent's Com., "254; 3 Dallas Penn., 171; 1 Sharswood Blackstone Com., "308."

A tax therefore cannot exist without a subject. Cannot be imposed except upon person or property. Congress can no more tax nothing than it can create the subject of taxation out of nothing.

This certainly cannot be regarded as a tax upon the person, and it is not a tax upon property, for it is admitted that nothing ever existed upon which it was levied.

It is unnecessary here to present argument or authority to demonstrate that the tax here sought to be imposed does not come within the legal definition of duty, impost or excise.

The constitution requires that taxes shall be uniform. If the construction claimed is the true one, this is not and cannot be uniform. The tax on spirits is fifty cents per gallon and four dollars per barrel. Had the distiller in this

case produced the full amount of 20 per cent. more than the estimated capacity of his distillery, his tax would have been fifty cents a gallon and four dollars per barrel. He made say only 50 per cent. of the estimated capacity, and the tax he has to pay is one dollar on every gallon and eight dollars on every barrel of what he actually manufactures. This result inevitably follows, if the imposition is considered as a tax.

It is neither uniform as to the person or property of distillers.

3d. This imposition upon a deficiency is a penalty and not a tax within the meaning of the law, — Congress, in effect says to the distiller, You have a distillery here, with which, by proper care and skill, you ought to make say 20,000 gallons of spirits per day. You can certainly make 1,600 gallons. If you do not make but 1000 gallons, you shall be punished for your want of skill, and shall pay $300 on account of this 600 gallons you ought to have made, and $4 per barrel besides. It will not do in this case to assume that the 600 gallons were made, for it is admitted that such is not the fact. Is it not precisely the same as though Congress had in terms imposed a penalty upon the distiller who should not succeed in making 80 per cent. of what his distillery was, in the opinion of the officers of the government, capable of producing? Would not precisely the same results have followed in the one case as in the other? This imposition partakes of the nature, and has all the elements of, a penalty, while it has none of the properties of a tax. If it is a penalty, it cannot be enforced against the distiller in this action. It can only be enforced, if at all, by informa-

tion or some proper proceeding for its collection. But, 4th, can it, as a penalty or a tax, be sustained? Can Congress impose a penalty upon the citizen because he has not the same skill and knowledge that others have? Can it, by legislation, punish the citizen because he is unable to conduct his business with the same success that others do? If so, it certainly has the power to destroy every business interest in the nation, because it is safe to say that while one man may make large amounts yearly in carrying on his business, nine in the same business may make but little more than a living for themselves and families.

In Bowen vs. Middleton, 1st Bay., 282, the Court held an act which divested a man of his freehold and passed it over to another was void, "as against common right as well "as against magna charta."

In Wilkinson vs. Leland, 2 Peters, 657, Justice Story said: "That government can scarcely be deemed to be free, "where the rights of property are left solely dependent upon "the will of a legislative body, without any restraint. The "fundamental maxims of a free government seem to require "that the rights of personal liberty and private property "should be held sacred. At least, no court of justice in this "country could be warranted in assuming that the power to "violate and disregard them — a power as repugnant to the "common principles of justice and civil liberty — lurked "under any grant of legislative authority, or ought to be "implied from any general expressions of the will of the "people. The people ought not to be presumed to part "with rights so vital to their security and well being, with-

"out very strong and direct expressions of such an inten-
"tion."

In Territ vs. Taylor, 9 Cranch, 43, the same judge gives expression to substantially the same doctrine.

In Ham vs. McClaws, 1 Bay, 98, the Court say: "It is "clear that statutes passed against plain and obvious prin-
"ciples of common right and common reason are absolutely "null and void, so far as they are calculated to operate "against those principles."

I am aware that this language was used in construing a statute, but it seems to be peculiarly applicable to the case at bar. In the case of Goshen vs. Stonnington, 4 Conn., 225, Hosmer, justice, says: "With those judges who assert "the omnipotence of the legislature in all cases where the "Constitution has not interposed an explicit restraint, "I can not agree; should there exist what I know is "not only an incredible supposition, but a most remote "improbability, a case of direct infraction of vested rights "too palpable to be questioned, and too unjust to admit of "vindication, I could not avoid considering it as a violation "of the social compact, and within the control of the judi-
"ciary."

5th. It seems to me that if this section is to receive the construction claimed by the plaintiff, then it is void, because by it the legislature attempted the exercise of a judicial power in excess of legislative authority, and not included in the apportionment of power made to that department.

It gives the assessor power to examine into and decide

upon the rights of distillers without any opportunity on their part to be heard, and to issue a warrant upon which their property can be seized and confiscated. "The legislative "power extends only to the making of laws, and in its exer- "cise it is limited and restrained by the paramount authority "of the Federal and State Constitutions. It can not directly "reach the property or vested rights of the citizen by pro- "viding for their forfeiture or transfer to another, without "trial and judgment in the courts; for to do so would be "the exercise of a power which belongs to another branch "of the government, and is forbidden to the legislative."

Newland vs. Marsh, 19 Ill., 382.

"That is not legislation which adjudicates in a particular "case, prescribes the rule contrary to the general law, and "orders it to be enforced. Such power assimilates itself "more closely to despotic rule than any other attribute of "government." Ervine's Appeal, 16 Penn. St., 266. See also Greenough vs. Greenough, 11 Penn. St., 494. Dechastellux vs. Fairchilds, 15 Penn. St., 18.

III.

The second question presented in this case arises upon the demurrer to second count of the declaration, and is whether the defendants are liable under the bond sued on for the payment of the store-keeper's wages, amounting to $110.

The law in force when this bond was signed, sec. 52 of the act of July 20, 1868, required that the United States pay this store-keeper. In conformity with this law, Davis, the store-keeper, was paid the sum of $110, all of which

was done after the execution of this bond. On the 29th of March, 1869, Congress passed a joint resolution directing that certain items which had been omitted in the enrollment of the appropriation act passed March 3d, 1869, should be added thereto, among which was a provision in the following language, to wit:

"That after the passage of this act the proprietors of "all internal revenue bonded warehouses shall reimburse to "the United States the expenses and salary of all store-"keepers or other officers in charge of such warehouses, and "the same shall be paid into the treasury and be accounted "for like other public moneys."

By this resolution Singer & Bickerdike were required to repay to the U. S. what it had paid to Davis.

We do not propose to discuss the question as to whether Singer & Bickerdike, in some other form of action, might not be liable for this sum, though it seems to us they would not. Our position, which is sufficient for this case, is that these sureties can not by any possibility be held liable for it; that they can not by an *ex post facto* resolution of Congress operating upon the condition of this bond executed before the date of this resolution, be held liable under it.

His Honor, Judge Drummond, in deciding this question in the Court below, used the following language:

"It is a matter of grave doubt whether this bond stands "on the same footing as an official bond; but conceding that "to be so, what is the true rule on the subject?

"One of the best considered cases to which the attention

"of the Court has been directed, is that of the Governor vs. "Ridgway, 12 Ill., R., 14, where the Supreme Court of "Illinois discusses and decides upon the effect of subsequent "legislation on the liability of sureties to official bonds, and "where this rule is stated. The sureties of an officer on "his official bond are liable for the faithful performance of "all duties imposed on him, whether by laws previous or "subsequent to the execution of the bond, if they properly "belong to and are within the scope of the particular office, "and not for those unconnected with it, and which can not "be supposed to have been contemplated by the parties at "the time they executed the bond.

"Some such principle as this must be adopted, or the con- "tract of a surety, instead of being construed strictly, as "confessedly it should be, is extended so as to include "obligations that he never assumed. Can it be fairly said "to have been within the contemplation of the sureties in this "case, that their principals would be required to refund "money which the Government, by existing law, if a store- "keeper was employed and assigned, was obliged to pay, "and that thus they were to be held accountable for such an "act done and default made after they signed the bond?

"If this be so, where is the limit to the responsibility "which may in this manner be cast upon a surety to an "official bond? The contract of a surety is secondary. He "is bound for the acts of his principal and not his own, and "if it be true that for what is fairly within the contempla- "tion of the parties, though *ex post facto*, he is bound; yet, "if we go beyond that, it would seem to violate the funda- "mental principles of the contract of the surety. If the "rule insisted on by the government in this case is maintain-

"able, it is difficult to see why the sureties to this bond "could not in the same manner, and by equivalent legisla- "tion, be made to reimburse the United States for the whole "expense of collecting every dollar of tax paid on dis- "tilled spirits by their principals.

"The decisions of the courts of the United States, which "are collected and cited by Mr. Brightly in his 'Federal "Digest,' 822, upon the contracts of sureties, are in con- "formity with the opinion here given."

The reasoning of the learned judge is conclusive upon the question here in controversy. We submit the case, so far as this point is concerned, without further argument.

IV.

There is another fatal objection to the maintenance of this suit.

This bond was entered into on the 18th day of January, 1869. To it not only the principals, but also their sureties, then signed their names.

The deficiency upon which, or on account of which, this assessment of $26,089.60 was levied, occurred in the month of November, 1868.

This suit is brought against the sureties as well as the principals.

The law (sec. 20) requires the assessor, on the receipt of distiller's first returns for each month, to inquire, etc., and

that distiller "shall be assessed for such deficiency at the "rate of fifty cents for every proof gallon," etc., and "the "collector shall proceed to collect the same as in other "cases of deficiency."

So this tax, penalty or debt, accrued and became due on December, 1868, before this bond was executed. The condition mentioned in the bond is as follows:

"The condition of the foregoing obligation is such that, "whereas, the said Jacob Singer and Joseph R. Bickerdike "now, or intend, on and after the 18th day of January, "1869, to be engaged in the business of a distiller, within "the first collection district of the State of Illinois, to wit: "at North branch Chicago river, near North avenue, situate "in the city of Chicago, county of Cook, and State afore- "said.

"Now, therefore, if the said Jacob Singer and Joseph R. "Bickerdike, shall in all respects faithfully comply with all "the provisions of law in relation to the duties and business "of distillers, and shall pay all penalties incurred or fines "imposed on him for a violation of any of the said pro- "visions, and shall not suffer the lot or tract of land on "which the distillery stands, or any part thereof, or any of "the distillery apparatus, to be encumbered by mortgage, "judgment, or other liens during the time in which he shall "carry on said business, then this obligation shall be void, "otherwise it shall remain in full force."

To say nothing of the liability of the principals under this bond, it seems certain that the sureties can not be charged with either debts, taxes or penalties that accrued against the

distillers prior to the execution and delivery of the bond in question.

An official bond is one given by an officer appointed or to be appointed to secure the performance of his duties and obligations as such officer.

This is not an official bond, but is simply a bond given by citizens to secure the payment of "all penalties incurred or "fines imposed" upon the distiller, and their faithful compliance with all the "provisions of the law in relation to "the duties and business of distillers."

So far as the sureties are concerned, it took effect "*in "presenti,*" and can have no retroactive effect. It renders them liable only for the acts and obligations of the distillers done and accrued after its execution.

Their liability can not be extended to their prejudice by construction. It is "*strictissimi juris.*" McClusky vs. Cromwell, 1 Kernan, 598. "The law will subject a man "having no interest in the transaction to pay the debt of "another only when his undertaking manifests a clear inten- "tion to bind himself for that debt." Marshall, C. J., in Russell vs. Clark, 7 Cranch, 90.

See also

Miller vs. Stewart, 9 Wheaton, 702.
Gates vs. McKee., 3 Kernan, 234.

Can it be contended that when these sureties executed this bond they intended to be bound to pay penalties or liabilities that had accrued to the government long before its execution?

that distiller "shall be assessed for such deficiency at the "rate of fifty cents for every proof gallon," etc., and "the "collector shall proceed to collect the same as in other "cases of deficiency."

So this tax, penalty or debt, accrued and became due on December, 1868, before this bond was executed. The condition mentioned in the bond is as follows:

"The condition of the foregoing obligation is such that, "whereas, the said Jacob Singer and Joseph R. Bickerdike "now, or intend, on and after the 18th day of January, "1869, to be engaged in the business of a distiller, within "the first collection district of the State of Illinois, to wit: "at North branch Chicago river, near North avenue, situate "in the city of Chicago, county of Cook, and State afore- "said.

"Now, therefore, if the said Jacob Singer and Joseph R. "Bickerdike, shall in all respects faithfully comply with all "the provisions of law in relation to the duties and business "of distillers, and shall pay all penalties incurred or fines "imposed on him for a violation of any of the said pro- "visions, and shall not suffer the lot or tract of land on "which the distillery stands, or any part thereof, or any of "the distillery apparatus, to be encumbered by mortgage, "judgment, or other liens during the time in which he shall "carry on said business, then this obligation shall be void, "otherwise it shall remain in full force."

To say nothing of the liability of the principals under this bond, it seems certain that the sureties can not be charged with either debts, taxes or penalties that accrued against the

distillers prior to the execution and delivery of the bond in question.

An official bond is one given by an officer appointed or to be appointed to secure the performance of his duties and obligations as such officer.

This is not an official bond, but is simply a bond given by citizens to secure the payment of "all penalties incurred or "fines imposed" upon the distiller, and their faithful compliance with all the "provisions of the law in relation to "the duties and business of distillers."

So far as the sureties are concerned, it took effect "*i* "*presenti*," and can have no retroactive effect. It renders them liable only for the acts and obligations of the distillers done and accrued after its execution.

Their liability can not be extended to their prejudice by construction. It is "*strictissimi juris*." McClusky vs. Cromwell, 1 Kernan, 598. "The law will subject a man "having no interest in the transaction to pay the debt of "another only when his undertaking manifests a clear inten- "tion to bind himself for that debt." Marshall, C. J., in Russell vs. Clark, 7 Cranch, 90.

See also

Miller vs. Stewart, 9 Wheaton, 702.
Gates vs. McKee., 3 Kernan, 234.

Can it be contended that when these sureties executed this bond they intended to be bound to pay penalties or liabilities that had accrued to the government long before its execution?

The condition of the bond is plainly prospective, and the case of Farrar vs. U. S., 5 Peters, 373, is decisive of this.

See also

U. S. vs. Boyd, 15 Peters, 207.
U. S. vs. Linn, 1 How., 104.
U. S. vs. Jones, 8 Peters, 399.
U. S. vs. Spencer, 2 McLean, 405.
Armstrong vs. U. S., Peters, C. C., 46.
U. S. vs. Broadhead, 3 Law Rep., 95.

MONROE & BISBEE,

Attorneys for Defendant.

15-123

SUPREME COURT OF THE UNITED STATES

December Term, A. D. 1871.

THE UNITED STATES

vs.

JOHN A. VAN BUSKIRK ET AL.

Argument for the Defendants.

Printed by the CHICAGO LEGAL NEWS Company, 15 North Jefferson St.

Supreme Court of the United States.

DECEMBER TERM, 1871.

THE UNITED STATES,
Plaintiff in Error,

vs.

JOHN A. VAN BUSKIRK,
SOLON CUMINS, AND
PHILIP MEANY,
Defendants in Error.

STATEMENT.

On the 14th day of October, 1868, John A. Van Buskirk, who was then a distiller doing business in Chicago, with the other defendants as his sureties, executed and delivered to the proper officers of the United States Government the following bond (Trans., page 3):

Distiller's Bond.

[This bond must be executed by every distiller before commencing or continuing business under this act, and on the first day of May, in each succeeding year. Act July 20, 1868, Sec. 7.]

Know all men by these presents that we, John A. Van Buskirk, of Chicago, Cook county, Illinois, as principal, and

Solon Cumins and Philip Meany, both of the same place, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of twenty thousand dollars, money of the United States, to which payment well and truly to be made we jointly and severally bind ourselves, our heirs, executors and administrators firmly by these presents, sealed with our seals, and dated this 14th day of October, A. D. 1868.

The condition of the foregoing obligation is such, that whereas the said John A. Van Buskirk intends, on or
11 after the 9th day of November, 1868, to be engaged in the business of a distiller within the first collection district of the State of Illinois, to wit, at his distillery situate in the city of Chicago, county of Cook, and State aforesaid:

Now, therefore, if the said John A. Van Buskirk shall in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions, and shall not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distillery apparatus to be encumbered by mortgage, judgment, or other lien during the time in which he shall carry on said business, then this obligation shall be void; otherwise it shall remain in full force.

JOHN A. VAN BUSKIRK. [SEAL.]
SOLON CUMINS. [SEAL.]
PHILIP MEANY. [SEAL.]

[25c. internal revenue stamp, canceled.]

Upon this bond the suit at bar was brought. The breach alleged in the declaration is that Van Buskirk did not comply with the provisions of the law relating to the business of distillers; that during the months of November and December, 1868, he manufactured spirits in his distillery and made return for those months for spirits so manufactured, and the quantity of spirits so manufactured was less than 80 per cent. of the producing capacity of said distillery as estimated under the provisions of the internal revenue law (Trans., page 3). The

declaration then alleges that the assessor, on the 10th day of February, 1869, made an assessment against Van Buskirk for the deficiency in said return, which amounted to the sum of $6,698.67, which he refused to pay.

To this declaration the defendants filed the following plea (Trans., p. 5):

Plea.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

JOHN A. VAN BUSKIRK, SOLON CUMINS, and PHILIP MEANY,
ats.
UNITED STATES OF AMERICA.

And the said defendants, by Monroe and McKinnon, their attorneys, come and defend the wrong and injury, when, etc., and say that the said John A. Van Buskirk made return to the collector of the first collection district of the State of Illinois, of all the highwines and spirits produced by him at his said distillery during the months of November and December, 1868, as by law he was required to do, and that assessments were made by said assessor against said John A. Van Buskirk, for the full amount of the tax on the highwines and spirits so produced and returned, and that the amount so assessed has been fully paid, and said defendants further aver that no other highwines or spirits were made or produced at said distillery during the said months of November and December, 1868, than what were returned as
15 aforesaid, and this said defendants are ready to verify; wherefore, etc.

By MONROE AND McKINNON,
Their Attorneys.

To this plea the plaintiff demurred. The demurrer was

by the court below overruled. To reverse this ruling the plaintiff brings this case by writ of error to this court.

ARGUMENT.

The demurrer admits that Mr. Van Buskirk has paid the tax upon every gallon and fraction of a gallon of spirits manufactured by him, and the question presented to this court is whether under the law he can be compelled to pay a tax upon *what he has not manufactured, upon what in fact never had an existence.*

I.

The object of the extraordinary provisions contained in this law was to enable the officers of the government to assess and collect the tax upon what should be actually produced, and *upon that alone.*

It will hardly be believed by this court that Congress intended, in the enactment of this law, to enable the government to collect a tax upon property not existing within its jurisdiction, or to compel the citizen to pay a tax either upon what he has not produced or what he cannot produce. If this court could be induced to believe that Congress so intended, its moral sense would be shocked when it sees that by other provisions of this law, the officers of the government are empowered to seize and sell the property of the citizen for the purpose of collecting this tax upon what he has not, and never had; and that, too, without legal process and without a chance to be heard in a court of justice. It is, at

least, certain that such construction will not be given to this law unless it is susceptible of no other.

The act of July 20, 1868, is entitled, "An act imposing "taxes on distilled spirits and tobacco, and for other purposes."

The most careful inspection of the first nineteen and the last eighty-nine sections of this law will show that in enacting its different provisions, Congress intended to provide the means for determining the amount of spirits actually manufactured by the distiller, and to enforce the collection of the tax thereon. From them no intimation can be gathered that it, by any possibility, intended to provide for the collection of tax upon what was not produced.

The 20th section of this law reads as follows: "And be "it further enacted, That on the receipt of the distiller's first "return in each month, the assessor shall inquire and deter- "mine whether said distiller has accounted in his returns for "the preceding month for all the spirits produced by him; and "to determine the quantity of spirits thus to be accounted for, "the whole quantity of materials used for the production of "spirits shall be ascertained; and forty-five gallons of mash "or beer brewed or fermented from grain shall represent not "less than one bushel of grain, and seven gallons of mash or "beer brewed or fermented from molasses shall represent not "less than one gallon of molasses. In case the return of "the distiller shall have been less than the quantity thus "ascertained, the distiller or other person liable shall be "assessed for such deficiency at the rate of fifty cents for "every proof gallon, together with the special tax of four

"dollars for every cask of forty proof gallons, and the collec-
"tor shall proceed to collect the same as in cases of other
"assessments for deficiencies ; but in no case shall the quan-
"tity of spirits returned by the distiller, together with the
"quantity so assessed, be for a less quantity of spirits than
"eighty per centum of the producing capacity of the dis-
"tillery as estimated under the provisions of this act."

Under this section the assessor levied the pretended tax for the collection of which this suit was brought.

The Honorable Thomas Drummond, whose great learning and large experience in this class of cases entitles his opinion to great weight, in deciding the case of the United States v. Singer & Bickerdike, carefully considered the meaning of this section of the law. His opinion upon the point under discussion is as follows :

"The first question turns upon the validity of the plea, and consequently upon the true construction of the 20th section of the Act of Congress of July 20th, 1868. That section declares that the assessor, in order to determine whether all the spirits produced in a distillery have been returned, shall ascertain the whole quantity of materials used for the production—"and forty-five gallons of "mash or beer brewed "or fermented from grain, shall represent not less than one "bushel of grain, and seven gallons of mash or beer brewed "or fermented from molasses shall represent not less than one gallon of molasses." If the return is less than the quantity thus ascertained, the distiller or other person shall be assessed for the deficiency, * * * * * "and the collector shall proceed to collect the same as in

"cases of other assessments for deficiencies." Now it will be observed that the language of the section as referred to above, seems to proceed on the basis that it has given a mode of ascertaining the quantity of spirits produced by declaring that forty-five gallons of mash shall represent one bushel of grain, under the implication that when the number of bushels of grain is known the quantity of spirits produced is exactly ascertained, an implication contrary to the fact, as is well understood by all practical distillers. If the section had arbitrarily declared how much spirits one bushel of grain should represent, then this part of the difficulty would be removed. The section concludes with this provision: "But in no case shall the quantity of spirits returned by the distiller, together with the quantity so assessed, be for a less quantity of spirits than eighty per centum of the producing capacity of the distillery as estimated under the provisions of this act.

"This 20th section would appear to have been framed for the purpose of prescribing a method of ascertaining the product of the distillery; or to impose a tax on its capacity as such; or to unite both, and thus if the distiller should in fact produce eighty per cent., then it was to be a tax on the product, and if less, on the capacity.

"In order to determine which of these is the true meaning of this section, the facts of this case should not be forgotten. It has been conceded in the argument by the district attorney that, so far as is known and believed by the officers of the government, the distillers in this case returned all the spirits they manufactured in the month of November, 1868. and that the assessment in controversy was made upon a quantity of spirits that never existed.

"In examining the act of July 20, 1868, the inquiry naturally arises — what was its object as to distilled spirits? It is entitled "An act imposing taxes on distilled spirits and tobacco and for other purposes." The first section declares what tax shall be levied and collected on distilled spirits, and the following sections contain various provisions for ascertaining and securing the payment of the tax. The tenth section designates in what manner the true producing capacity of each distillery shall be determined, and how errors in such estimate shall be corrected. The thirteenth section imposes a daily tax upon the distiller in proportion to the capacity of his distillery for mashing and fermenting grain, etc.

"The 14th, 15th, 16th 17th, 18th and 19th sections contain various and minute directions as to the construction of buildings and machinery and the mode of manufacture, in addition to those previously prescribed, and the main object of which appears to be to guard against dishonest practices by the distiller. Besides all this, the distiller or principal manager is to make his return three times a month under oath, stating the quantity and kind of materials used for the production of spirits each day, and the number of wine gallons and proof gallons of spirits produced, and he is bound to include all, because he must asseverate there was no more used or produced. After this follows the 20th section, the substance of which has been already stated, and numerous others, all of the same general purport up to the 59th, which imposes an annual special tax upon distillers in proportion, not to the capacity, but to the actual product of the distillery.

"If it were the purpose of the law to assess also a tax upon

the capacity alone of a distillery as representing its actual product, and in this way tax the supposed product itself, and if it be true that such a tax is something else than an assessment upon the distillery and machinery, merely because they possess a certain property or quality, then it is singular that such multifarious and complicated provisions were considered necessary to ascertain and collect the amount. If the producing capacity of a distillery is known — then it is a simple thing to say, it shall pay fifty cents as a tax on every gallon it is capable of producing; and the complex and expensive arrangements and safe-guards to prevent fraud thrown around the manufacture of distilled spirits, could be dispensed with at once. The object of so much legislation must have been to ascertain the product and thus compel the payment of a tax on the whole of the article manufactured. Such a tax may be said to be just as having something on which to operate; whereas a tax on the producing capacity of a distillery, if it be not a tax on the distillery itself, is often on a mere imaginary thing. It is like the attempt to tax an income where there is none. If we examine the language of the 20th section in connection with that part of the 19th section, already referred to, this view of the law will be strengthened. The distiller must return the whole of the spirits manufactured under oath, but in no case shall the quantity returned be less than eighty per cent. of the producing capacity of the distillery, so that, literally, if the distillery has produced less than eighty per cent., which is alleged to be the fact in this case, then the distiller is required to make a false return and swear to it. This certainly can not be the meaning of this section, because a previous part of the section, after assuming — contrary to the

fact — that a test of quantity had been given, directs an assessment to be made if the quantity returned shall be less than that thus ascertained.

"The only construction that can be given to this section, consistent with reason and the general scope and purpose of the law, in my opinion, is — if the return is not equal to eighty per cent. of the producing capacity of the distillery, the assessor shall assume that it ought to have been, and the distiller shall then be assessed on that basis, as a method of discovering the actual product. It could not have been intended the distiller should return what he had not produced, nor that he should pay a tax on nothing. My conclusion is that the object of this section of the law is accomplished when the distiller has paid the proper tax on all the spirits he has manufactured. The letter of the section seems to be framed on a certain theory, but it is not possible, even for an act of Congress, to make a bushel of grain produce more spirits than nature has supplied and science and skill can extract. One bushel of grain is not always precisely like another, nor is distilling always carried on under precisely the same circumstances, nor with precisely similar machinery and appliances of manufacture. And if a distillery has run part of a month, and is accidentally destroyed by fire or otherwise, is the letter of the statute still to be followed and an assessment of eighty per cent. made and enforced for the whole month when the product may have become impossible? And if not, why not? Such is a case in actual controversy in this Court.

"Admitting then it may have the effect of compelling the distiller to establish, when he has not returned eighty per cent. of the producing capacity of his distillery did not pro-

duce it, I must hold when that is done, it is an answer to the claim set up under this section for an alleged deficiency—the fact then being that a deficiency does not exist. * * * In conclusion, on this part of the case, it must be said once more that if the position of the government is correct, that the law intended to levy and collect a tax of fifty cents on every gallon of distilled spirits which a distiller was capable of producing without regard to the fact that it ever was actually manufactured, it is to be regretted the meaning was not more clearly expressed. It was only to determine the producing capacity of the distillery, and the beginning and end of its operations, and the thing was done. Instead of which we have a series of restrictions and impositions, and a system of inquisition and espionage upon distilling—admitted by the act to be a lawful occupation—which if extended to all other kinds of business would make the collection of taxes odious and oppressive, and indeed, well nigh intolerable." 3 Chicago Legal News, 81.

The reasoning of the learned Judge upon the construction of this section seems conclusive. This decision is certainly in accordance with justice and right, and in harmony with that principle of the law which requires that statutes, if possible, be so construed as to be equal and fair in their operation and unoppressive to the citizens. Indeed it is a general rule that statutes which abridge the liberty of the citizen, or are oppressive in their operation, must be strictly construed.

Shall should be construed to mean *may*, and section 20 must, as it seems to me, be regarded as directory. This section being directory, the assessor ought not to, and cannot,

legally follow the rule it lays down, unless he believes it will enable him to ascertain the amount produced. By section 20 the assessor is directed to "inquire and determine "whether the distiller has accounted in his returns for the "preceding month for all the spirits produced by him." If, as is understood in this case, the distiller did return "all the spirits produced by him, and the assessor so believed, it would seem to any just man that the duty of the assessor was in this respect ended, and that he was authorized by the law to go no further. To then go on and levy a tax upon what had not been produced, was repugnant to common sense and common honesty.

Again, every charge upon the subject must be imposed by clear and unambiguous terms, and when any ambiguity is found the statute must be construed in favor of the citizen. It was conceded by the district attorney upon the argument below that there was an hiatus beetween the different parts of this section — between "five gallons of beer" and "spirits." Such seems clearly to be the case, and if so, the court cannot supply it. It is very likely that had it not been for such omission the intention of the legislature would have been plainly different from the claim of the plaintiff, and would have left no doubt as to its intention to provide the means of ascertaining the exact amount of spirits produced and to tax that and nothing else. The law nowhere states what amount of *proof spirits* shall represent a bushel of grain, and unless we can tell how much proof spirits Congress intended should represent a bushel of grain, we can only guess at its intention, or at most reach it by inference. It may be argued that proof spirits being defined by the act,

proof gallon means a gallon of proof spirits, but in the construction of such a statute as this have we a right to assume this? Should we seek to supply sentences or even words in order to fix a construction upon this statute that must be regarded as oppressive and unjust in the highest degree?

It is not improper, in construing a doubtful statute, to look to the consequences that would follow the construction asked.

If the plaintiff is right in the construction of this section, a distiller might commence business to-day, and before he had manufactured a single gallon of spirits his distillery might be destroyed by fire and he held bound to pay a tax of 80 per cent. upon the full capacity of his distillery for the full month; or from some accident to his machinery, without any fault of his, he might not be able to run one quarter of the month and still be compelled to pay the same tax as though no accident had happened.

It is perhaps not improper to state that the government is now seeking to enforce such claims in the Northern District of Illinois.

II.

If the construction above given to this section is not the true one, then it is void; 1st. Because Congress cannot levy a tax upon nothing; 2d. Because the tax it seeks to levy is not and cannot be uniform; 3d. Because this imposition upon a deficiency is not a tax, but is a penalty, and cannot be enforced by an action upon the distiller's bond; 4th. Because if Sec. 20 is to be literally construed, it empowers the

officers of the law to seize and confiscate the property of the citizen, who has been guilty of no crime or offense known to the law; and, 5th. Because the legislature attempted the exercise of a judicial power in excess of legislative authority.

Before the fire I carefully prepared an argument upon the points here made. By it every paper in my office, my own and every other law library in this city was destroyed, and we are yet without anything like a complete library in this city. I shall therefore be compelled to argue the question here presented upon principle mainly.

1st. Congress cannot levy a tax upon nothing. It is admitted tnat this tax of $6,698 $\frac{67}{100}$ was levied upon nothing: that the thirteen thousand and odd gallons, upon which the assessor sought to impose it, never had an existence.

A tax is defined by Webster to be a "rate or sum of "money assessed upon the person or property of a citizen "by government for the use of the nation or state."

"Tax is a term of general import, including almost every "species of imposition on persons or property for supplying "the public treasury, as tolls, tribute, subsidy, excise, "impost or customs. But more generally, tax is limited to "the sum laid upon polls, lands, houses, horses, cattle, "professions and occupations."

Bouvier defines a tax as follows: "A contribution imposed "by government upon individuals for the government of the "state. It is distinguished from a subsidy as being certain "and orderly, which is shown in its derivation from Greek "*taxis ordo*, order or arrangement. The eighth section of

"article one of the Constitution of the United States pro-
"vides that 'Congress shall have power to levy and collect
"taxes, duties, imposts, and excises, to pay,' etc. 'But all
"duties, imports and excises shall be uniform throughout the
"United States.' In this sense taxes are usually divided
"into two great classes, those which are direct and those
"which are indirect. Under the former denomination are
"included taxes on land as real property, and under the
"latter taxes on articles of consumption. 5 Wheaton. See
"generally Story on the Constitution, c. 14. 1 Kent's Com.,
"254; 3 Dallas Penn., 171; 1 Sharswood Blackstone Com.,
"308."

A tax therefore cannot exist without a subject. Cannot be imposed except upon person or property. Congress can no more tax nothing than it can create the subject of taxation out of nothing.

This certainly cannot be regarded as a tax upon the person, and it is not a tax upon property, for it is admitted that nothing ever existed upon which it was levied.

It is unnecessary here to present argument or authority to demonstrate that the tax here sought to be imposed does not come within the legal definition of duty, impost or excise.

The constitution requires that taxes shall be uniform. If the construction claimed is the true one, this is not and cannot be uniform. The tax on spirits is fifty cents per gallon and four dollars per barrel. Had the distiller in this case produced the full amount of 20 per cent. more than the estimated capacity of his distillery, his tax would have been fifty cents a gallon and four dollars per barrel. He made say

only 50 per cent. of the estimated capacity, and the tax he has to pay is one dollar on every gallon and eight dollars on every barrel of what he actually manufactures. This result inevitably follows, if the imposition is considered as a tax.

It is neither uniform as to the person or property of distillers.

3d. This imposition upon a deficiency is a penalty and not a tax within the meaning of the law, — Congress, in effect, says to the distiller, You have a distillery here, with which, by proper care and skill, you ought to make say 20,000 gallons of spirits per day. You can certainly make 1,600 gallons. If you do not make but 1000 gallons, you shall be punished for your want of skill, and shall pay $300 on account of this 600 gallons you ought to have made, and $4 per barrel besides. It will not do in this case to assume that the 600 gallons were made, for it is admitted that such is not the fact. Is it not precisely the same as though Congress had in terms imposed a penalty upon the distiller who should not succeed in making 80 per cent. of what his distillery was, in the opinion of the officers of the government, capable of producing? Would not precisely the same results have followed in the one case as in the other? This imposition partakes of the nature, and has all the elements of, a penalty, while it has none of the properties of a tax. If it is a penalty, it cannot be enforced against the distiller in this action. It can only be enforced, if at all, by information or some proper proceeding for its collection. But, 4th, can it, as a penalty or a tax, be sustained? Can Congress impose a penalty upon the citizen because he has not the

same skill and knowledge that others have? Can it, by legislation, punish the citizen because he is unable to conduct his business with the same success that others do? If so, it certainly has the power to destroy every business nterest in the nation, because it is safe to say that while one man may make large amounts yearly in carrying on his business, nine in the same business may make but little more than a living for themselves and families.

In Bowen vs. Middleton, 1st Bay., 282, the Court held an act which divested a man of his freehold and passed it over to another was void, "as against common right as well "as against magna charta."

In Wilkinson vs. Leland, 2 Peters, 657, Justice Story said: "That government can scarcely be deemed to be free, "where the rights of property are left solely dependent upon "the will of a legislative body, without any restraint. The "fundamental maxims of a free government seem to require "that the rights of personal liberty and private property "should be held sacred. At least, no court of justice in this "country could be warranted in assuming that the power to "violate and disregard them — a power as repugnant to the "common principles of justice and civil liberty — lurked "under any grant of legislative authority, or ought to be "implied from any general expressions of the will of the "people. The people ought not to be presumed to part "with rights so vital to their security and well being, with-"out very strong and direct expressions of such an inten-"tion."

In Territ vs. Taylor, 9 Cranch, 43, the same judge gives expression to substantially the same doctrine.

In Ham vs. McClaws, 1 Bay, 98, the Court say: "It is "clear that statutes passed against plain and obvious prin- "ciples of common right and common reason are absolutely "null and void, so far as they are calculated to operate "against those principles."

I am aware that this language was used in construing a statute, but it seems to be peculiarly applicable to the case at bar. In the case of Goshen vs. Stonnington, 4 Conn., 225, Hosmer, justice, says: "With those judges who assert "the omnipotence of the legislature in all cases where the "Constitution has not interposed an explicit restraint. "I can not agree; should there exist what I know is "not only an incredible supposition, but a most remote "improbability, a case of direct infraction of vested rights "too palpable to be questioned, and too unjust to admit of "vindication, I could not avoid considering it as a violation "of the social compact, and within the control of the judi- "ciary."

5th. It seems to me that if this section is to receive the construction claimed by the plaintiff, then it is void, because by it the legislature attempted the exercise of a judicial power in excess of legislative authority, and not included in the apportionment of power made to that department.

It gives the assessor power to examine into and decide upon the rights of distillers without any opportunity on their part to be heard, and to issue a warrant upon which their

property can be seized and confiscated. "The legislative "power extends only to the making of laws, and in its exer- "cise it is limited and restrained by the paramount authority "of the Federal and State Constitutions. It can not directly "reach the property or vested rights of the citizen by pro- "viding for their forfeiture or transfer to another, without "trial and judgment in the courts: for to do so would be "the exercise of a power which belongs to another branch "of the government, and is forbidden to the legislative."

Newland vs. Marsh, 19 Ill., 382.

"That is not legislation which adjudicates in a particular "case, prescribes the rule contrary to the general law, and "orders it to be enforced. Such power assimilates itself "more closely to despotic rule than any other attribute of "government." Ervine's Appeal, 16 Penn. St., 266. See also Greenough vs. Greenough, 11 Penn. St., 494. Dechastellux vs. Fairchilds, 15 Penn. St., 18.

The question in this case presented for adjudication is one of great importance, not only to these defendants, but to the whole country. Upon its decision millions of dollars depend. It is for this high tribunal to decide whether a citizen carrying on a lawful business can be forced to pay a tax upon what he has not produced and upon what he can not produce, or a penalty for not being able to produce what the assessor may think he ought to produce.

MONROE & BISBEE,

Attorneys for Defendant.